Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND
ALL OTHER PERSONS SIMILARLY SITUATED,
Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Louisiana courts certified a class of over 500,000 Louisiana smokers seeking the costs of smoking cessation treatment and other monetary relief. After aggregating in one lawsuit the class members' disparate, highly individualized tort claims—which targeted actions and statements of different defendants at different times over nearly 50 years—the Louisiana courts used classwide adjudication to determine not the individual claims of representative plaintiffs or other class members, but rather a single, "unitary" claim supposedly asserted by the "class as a whole." That unorthodox procedure eliminated individualized elements of liability (such as reliance on the alleged fraud) and affirmative defenses that unquestionably would have been adjudicated if class members had sued individually. The result was a massive $270 million award for smoking cessation relief for the "class as a whole" in a case where no one in the class was required to prove the elements of an individual claim—and both class representatives had already quit smoking well before the time of trial.

The question presented is:

Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims.

RULE 14.1(B) STATEMENT

In addition to the parties named in the caption, petitioners include Brown & Williamson Holdings, Inc., R. J. Reynolds Tobacco Company, Lorillard Tobacco Company, and The Tobacco Institute, Inc. Respondent Deania Jackson is a class representative and, as such, purports to represent a class consisting of "all Louisiana residents who are or were smokers on or before May 24, 1996, of cigarettes manufactured by the" petitioners, and "who desire to participate in a program designed to assist them in the cessation of smoking and/or to monitor the medical condition of class members to ascertain whether they may be suffering from diseases caused by, contributed to, or exacerbated by the habit of cigarette smoking, provided the class member alleges that he or she commenced smoking before September 1, 1988, or that one or more defendants actively and intentionally engaged in a course of conduct designed to undermine or eliminate compliance with or attention to warnings on cigarette packaging."

In the lower courts, Gloria Scott (like respondent Deania Jackson) was a class representative. Ms. Scott died on May 17, 2007.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

Petitioner Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly traded corpora-

tion. Before August 2, 2004, Brown & Williamson Holdings, Inc. was known as Brown & Williamson Tobacco Corporation. On July 30, 2004, a transaction was completed whereby R. J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business.

Petitioner R. J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R. J. Reynolds Tobacco Company, a New Jersey corporation. The existing R. J. Reynolds Tobacco Company is an indirect, wholly owned subsidiary of Reynolds American Inc., which is a North Carolina corporation and is publicly traded. British American Tobacco p.l.c. is a publicly traded corporation and it has an indirect, wholly owned subsidiary, Brown & Williamson Tobacco Holdings, Inc., that owns more than 10% of the stock of Reynolds American Inc. Invesco Ltd. is a publicly traded corporation and it has a subsidiary, Invesco Asset Management Limited, that owns more than 10% of the stock of Reynolds American Inc.

Petitioner Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard Inc., a publicly traded company.

Petitioner The Tobacco Institute, Inc., is a dissolved not-for-profit corporation organized under New York law. During its existence, The Tobacco Institute, Inc. did not issue stock and had no parent corporation. In addition, since its dissolution, The Tobacco Institute, Inc. has not issued stock and has had no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc., Brown & Williamson Holdings, Inc., R. J. Reynolds Tobacco Company, Lorillard Tobacco Company, and The Tobacco Institute, Inc. respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinions of the Louisiana Fourth Circuit Court of Appeal issued in 2010 (App. 1a-30a), 2007 (App. 31a-79a), and 1998 (App. 281a-303a) are respectively reported at 36 So. 3d 1046, 949 So. 2d 1266, and 725 So. 2d 10. The order of the Louisiana Supreme Court denying review (App. 80a-81a) is reported at 44 So. 3d 707. The trial court's amended judgment (App. 82a-85a), judgment (App. 86a-87a), and accompanying "Reasons for Judgments" (App. 88a-99a), are all unpublished.

JURISDICTION

The Court of Appeal issued its decision on April 23, 2010, and denied rehearing on May 12, 2010. On September 3, 2010, the Louisiana Supreme Court denied applications for writs of certiorari or review. App. 80a-81a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the U.S. Constitution and the Louisiana Code of Civil Procedure, La. C.C.P. arts. 591, 592, and 593.1 (1996), are reproduced at App. 304a-06a.

STATEMENT

The handling of this case by the Louisiana courts represents a profound departure from "traditional" procedure. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability and raise all affirmative defenses. Class actions, a relatively modern innovation, comply with that basic guarantee only insofar as they adjudicate individual claims, asserted by selected class members, that truly represent the individual claims of all other class members. See, *e.g.*, *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940).

That due process guarantee was eviscerated by the proceedings below. In conflict with long-settled practice, the Louisiana courts permitted members of a class of over 500,000 smokers to recover without ever proving the individualized elements of liability—or withstanding the individualized affirmative defenses—that Louisiana law establishes in tort suits brought by individual plaintiffs. Instead, the courts below jettisoned the class members' disparate and individualized tort claims and adjudicated instead a "common unitary claim" supposedly held by the "class as a whole." App. 63a; see also App. 35a, 46a. So complete was the Louisiana courts' abandonment of *representative* litigation that they even dismissed as "harmless error" the denial of defendants' right to a full and fair opportunity to cross-examine the class representatives at trial. App. 48a-49a. The end result was a $270 million judgment requiring defendants to pay for smoking-cessation services for *every* member of the class even though *no*

class member ever proved the established elements of his or her individual claim or confronted any individual defenses, and both class representatives had quit smoking before trial.

As Justice Scalia noted in staying the judgment, the rulings below "eliminated any need for plaintiffs to prove, and denied any opportunity for [defendants] to contest, that any particular plaintiff who benefits from the judgment (much less all of them)" actually relied upon the defendants' alleged fraud. *Philip Morris USA Inc.* v. *Scott*, No. 10A273, slip op. at 3 (Sept. 24, 2010) (Scalia, J., in chambers). With those fundamental safeguards eliminated, the trial in this case took on an Alice-in-Wonderland quality, lacking any resemblance to either traditional one-on-one civil adjudication or any constitutional form of "representative" litigation. Review of the Louisiana courts' decisions upholding these highly unorthodox procedures is warranted to resolve "important" and recurring questions regarding "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process" in state court litigation. *Ibid.*

A. Pretrial and Trial Proceedings

On May 23, 1996, the Fifth Circuit decertified a nationwide class of smokers in part because individualized issues such as reliance and causation predominated over common issues and precluded class adjudication. *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (1996). One day later, two of the class representatives in *Castano*—Gloria Scott (now deceased) and respondent Deania Jackson—filed this lawsuit in the Civil District Court for the Parish of Orleans, bringing parallel claims against the same

defendants on behalf of a purported statewide class of current and former Louisiana smokers.

Plaintiffs advanced three legal claims—product defect, fraud, and breach of an assumed duty—and eventually sought to recover the costs of medical monitoring and smoking cessation services. Under Louisiana law, the essential elements of a fraud claim include proof that the plaintiff justifiably relied on a misrepresentation of material fact that caused the plaintiff to suffer an injury. *Banks* v. *New York Life Ins. Co.*, 737 So. 2d 1275, 1281-83 (La. 1999). Similarly, a tort claim for breach of an assumed duty requires proof of causation and, in cases such as this, "reliance on" the defendant's undertaking. RESTATEMENT (SECOND) OF TORTS § 323 (1965); *Dornak* v. *Lafayette General Hosp.*, 399 So. 2d 168, 170 (La. 1981). In response to these claims, defendants raised a number of individualized affirmative defenses, including comparative fault and prescription (the Louisiana term for statute of limitations). App. 50a, 222a.

1. *Class Certification and Pretrial Proceedings.* Notwithstanding the highly individualized nature of plaintiffs' claims and defendants' defenses, the trial court certified a class consisting of all Louisiana smokers and former smokers who "desire to participate" in a medical monitoring or smoking cessation program. See page ii, *supra* (setting forth full class definition). The court rejected defendants' arguments that individualized issues predominated over any common issues and therefore (as in *Castano*) precluded class certification. See, *e.g.*,, R.2:558-59.

On interlocutory review, the Louisiana Court of Appeal for the Fourth Circuit affirmed class certifi-

cation. App. 281a-303a. Although it recognized that certification of "mass tort" cases is "disfavored," in part because it "skew[s] trial outcomes" and "magnifies and strengthens the number of unmeritorious claims," the appellate court concluded that class-action treatment was appropriate because the liability alleged here relied on a "common theory" of liability. App. 286a, 290a-91a. According to the court, the case "boil[ed] down to one fundamental question: Is a cigarette that contains nicotine a defective product?" App. 286a.

On remand, the trial court established a two-phase trial plan. Phase I would address all "common" issues of fault and causation, as well as any classwide defenses, to determine defendants' liability to the "class as a whole." Phase II, if necessary, would address "the items of damage common to the class." App. 220a. On interlocutory appeal, the Louisiana Supreme Court approved the trial plan, App. 260a-280a, but cautioned that the trial court should "formulate a plan for a subsequent phase of trial in which sub-classes might be formed and more individualized issues, such as comparative fault and prescription, might be addressed." App. 267a.

2. *The Phase I Trial.* During Phase I, the trial court excused plaintiffs from proving their individual claims. There was no evidence that the class representatives or *any* identifiable class member had detrimentally relied on any alleged misstatement or omission or had otherwise been injured by defendants' conduct. Instead, plaintiffs based their case entirely on expert witnesses who opined about smoking's general physical effects and defendants' advertising and other public communications over nearly half a century. Those witnesses did not (and could not) connect their assertions to the class

representatives or any other identifiable class members. See, *e.g.*, 2003-01-23 Tr. 11575-76; 2003-02-11 Tr. 13404, 13430, 13457-58, 13464-65; 2003-02-21 Tr. 14568.

The only class members called by plaintiffs to testify at trial were the two class representatives, Scott and Jackson. On direct examination, both declared that they were class members and desired smoking cessation services. In their pretrial depositions and elsewhere, however, both had admitted facts that conclusively negated their claims. Both had smoked for reasons *unrelated* to any supposed misstatement or omission by defendants. See, *e.g.*, 2003-03-27 Tr. 17360-63; 2003-03-31 Tr. 17510-15. Both admittedly knew of their alleged addiction years before they filed suit, which time-barred their claims. And neither needed cessation assistance: both had quit smoking years before trial (Scott in 2000, Jackson in 2001). See, *e.g.*, R.85:25625; R.86:25632-37, 25640; 2003-03-27 Tr. 17274-82, 17366, 17391-92; 2003-03-31 Tr. 17448-54, 17476, 17483-84.

When defendants' counsel sought to cross-examine Scott and Jackson about these admissions and other facts that would disprove their claims or support affirmative defenses, the trial court refused to allow that questioning. See 2003-03-29 Tr. 17261-62 (threatening to hold counsel in contempt for raising any questions related to individualized issues). Such facts, the court declared, related to issues that were "individualized" and could not be adjudicated in the Phase I trial. See 2003-03-24 Tr. 16856-58 (refusing to "allow questions of these class representatives having to do with" various "individualized issues").

Over defendants' objections, the trial court's jury charge then formally relieved plaintiffs of their burden to prove the requisite elements of their individual fraud-based claims. It instructed that, although "[u]nder Louisiana law, three basic elements are usually necessary to prove a case of fraud"—misrepresentations, an intent to deceive, and justifiable reliance—"plaintiffs in this case ... do *not* have to establish individual reliance on specific concealments or misrepresentations allegedly made by these defendants." 2003-07-24 Tr. 23506 (emphasis added). Instead, the court announced that plaintiffs needed to prove only that defendants "intentionally engaged in actions designed to *distort the body of public knowledge* concerning smoking and health"; that "an intended and foreseeable class of Louisiana citizens" reasonably relied to their detriment on "this distorted body of knowledge"; and that such reliance by the group somehow "caused or contributed to the need for ... cessation of smoking programs." *Id.* at 23507 (emphasis added); accord App. 225a-59a (special verdict form).[1]

At the end of Phase I, the "one fundamental question" that had supposedly justified class treatment—whether cigarettes were a "defective" product—was answered by the jury in *defendants'* favor. The jury also found that medical monitoring

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[1] The trial court's sole authority for using the "distortion of public knowledge" concept to excuse proof of individualized reliance (see App. 215a-216a) was a RICO decision by Judge Weinstein, *Falise* v. *American Tobacco Co.*, 94 F. Supp. 2d 316, 335 (E.D.N.Y. 2000). That decision cited no supporting authority and was later repudiated. See *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 224 (2d Cir. 2008).

was unnecessary. The jury, however, returned a verdict in plaintiffs' favor on their fraud and assumed duty claims, but did so without finding that either of the class representatives or any other identifiable class member had relied on any supposed "distortion" or was injured by defendants' conduct. The jury also accepted plaintiffs' request for smoking cessation relief. App. 225a-59a.

3. *Post-Phase I Rulings.* The jury's Phase I verdict, rejecting plaintiffs' product defect claim—the "one fundamental question" that supposedly justified class treatment—should have prompted the trial court to decertify the class. Instead, the court ruled that various individualized liability issues that unquestionably would be the focal point of any trial of an individual class member's suit were now legally *irrelevant*. App. 199a-201a, 221a-22a. In particular, the court ruled that classwide reliance and causation had been fully adjudicated in Phase I for all class members, notwithstanding the court's prior recognition (in restricting cross-examination of the named plaintiffs) that such issues were inherently individualized. It concluded that there were no remaining liability issues because the Phase I trial had established defendants' liability on "a single, common, unitary" claim held by the "class as a whole," *i.e.*, that defendants had "distort[ed] the body of public knowledge." App. 194a, 199a, 222a.

The trial court also summarily invalidated all affirmative defenses as to each and every class member. It held that comparative fault was never to be tried, and that prescription *had* been tried—despite the absence of any findings regarding when any class member became aware of his or her claim—and was overridden for all class members by the "continuing tort" doctrine. App. 221a-22a. The

court declared that Phase II would be limited to deciding the scope and cost of a cessation remedy, and any issue of individualized reliance by any class member would be "reserved" for a later phase if and when any class member sought damages for personal injury. App. 220a, 222a. (No such phase ever occurred.)

4. *The Phase II Trial and Entry of Judgment.* In Phase II, plaintiffs sought more than $1 billion for a 25-year smoking cessation program consisting of 12 components (only the first four of which involved traditional cessation aids such as nicotine gum and patches). After hearing testimony from experts for both sides, the jury accepted plaintiffs' cost calculation formula and all 12 components but limited the program's duration to ten years. To fund the program, the jury awarded approximately $592 million. App. 171a-87a.[2]

B. Appellate and Remand Proceedings

1. *The Court of Appeal's 2007 Decision.* The Court of Appeal affirmed in part, reversed and amended the judgment in part, and remanded. App., 31a-79a. The appellate court was untroubled by the trial court's glaring due process errors. App. 43a-48a, 62a-65a. Although it acknowledged that as a matter of Louisiana law a fraud claim "requires causation in the form of reliance," and that plaintiffs had not established detrimental reliance as to any class member, the court held that proof of

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[2] In so doing, the jury adopted plaintiffs' estimates of class size and the rate at which class members would utilize the 12-component program, finding that 40% of 505,949 supposed class members would participate. App. 24a, 171a-87a.

individualized reliance was unnecessary in the context of a class action. App. 46a. In the court's view, "reliance" by "the class as a whole" was sufficient, and could rest on a "distort[ion of] the entire body of public knowledge," rather than on any identifiable misstatements or omissions. *Ibid.* Similarly, the court upheld liability for breach of an assumed duty without requiring proof of individualized causation or reliance as to any class member.

The appellate court also affirmed the trial court's nullification of affirmative defenses and its refusal to allow defendants to cross-examine the class representatives on essential elements and defenses. It made no difference, the court concluded, why the named plaintiffs began and continued smoking, whether they relied on any supposed misstatements or omissions, whether they were addicted, why they stopped smoking, or when they had notice of their claims. According to the court, the denial of cross-examination was "harmless" because there was ample evidence that defendants had distorted the overall body of public knowledge to the detriment of "the class as a whole." App. 48a-57a.

Although the Court of Appeal refused to set aside the proceedings on due process grounds, it did find two errors affecting the jury's verdict. *First*, it held that defendants had been improperly held liable to a "large group of plaintiffs" whose claims accrued on or after September 1, 1988 and were therefore barred by the Louisiana Products Liability Act (LPLA), La. Rev. Stat. Ann. § 9:2800.51 *et seq.* App. 38a-43a, 62a. *Second*, the court invalidated components 5 through 12 of the cessation program, finding that

those components were "not legally recoverable." *Id.* at 71a.[3]

2. *The Remand Proceedings.* On remand, the trial court rejected defendants' request for further evidentiary proceedings. Instead, the court simply eliminated the amount for program components 5-12 ($328 million), and reinstated the full $264 million award for components 1-4. The court thus refused to make two necessary reductions in the award, to reflect (a) the exclusion of LPLA-barred smokers, and (b) the decrease in the program's "utilization rate" (the percentage of class members expected to use the program) caused by eliminating components 5-12, which included massive advertising expenditures to boost utilization. In a remarkable understatement, the trial court acknowledged that the award "may be too large," but it denied any need for a "recalculation of class size, and/or quantum." App. 89a-90a.

3. *The Court of Appeal's 2010 Decision.* The Court of Appeal amended the judgment in part and affirmed. App. 1a-30a. Although it recognized that the trial court had failed to conduct appropriate proceedings on remand, App. 18a, the appellate court declared that further evidentiary proceedings were

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[3] After both sides unsuccessfully sought further review in the Louisiana Supreme Court, defendants unsuccessfully sought review in this Court. *Philip Morris USA Inc.* v. *Jackson*, 553 U.S. 1094 (2008) (order) (No. 07-1272). The petition for certiorari was limited to a request for a "hold" pending the resolution of certain federal preemption issues in *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538 (2008). Plaintiffs opposed review on the ground that there was no "final judgment" under 28 U.S.C. § 1257(a).

unnecessary, concluding that it could resolve the remaining factual issues itself (see App. 19a-28a) on the basis of the same evidentiary record that had prompted it in 2007 to "remand this matter for further proceedings" (App. 74a). *First*, the appellate court speculated (with no record support) that the individual claims of "at least 210,000" class members had accrued before September 1, 1988 and thus were not barred by the LPLA. App. 27a. *Second*, it assumed, contrary to all record evidence (including plaintiffs' admissions at trial), a nonsensical *100%* utilization rate for the scaled-back cessation program. App. 23a, 27a-28a; see also note 2, *supra*. Using those invented assumptions, the court re-calculated the cost of components 1-4 at $242 million, a mere $22 million reduction from the $264 million originally awarded by the jury for the same components, but for a group more than *twice* as large. App. 27a-28a. The court ordered immediate payment of the full amount (currently $270 million with accrued interest).

For the second time, the Louisiana Supreme Court denied review and also denied defendants' request for a stay. On September 24, 2010, Justice Scalia, acting as Circuit Justice, stayed execution of the judgment.

REASONS FOR GRANTING THE PETITION

This case turns on whether the Due Process Clause permits state courts to impose massive liability in a class action without a truly representative trial of individual claims. The courts below candidly acknowledged that elements and defenses that would have been indispensable in individual cases were eliminated to make this case "work" as a class action. The departure from representative

litigation was so extreme that defendants were denied any meaningful opportunity to cross-examine the class representatives, and hundreds of millions of dollars were awarded for a smoking cessation remedy where both class representatives had already quit smoking years before trial.

The constitutional question raised by these proceedings is of vital importance. Simply put: Does a class action permit the aggregation of individual claims only where the named plaintiffs are truly representative of absent class members—advancing and proving individual claims that typify those of absent class members—or may a state court use the class-action device to excuse the class representatives from proving such claims by eliminating fundamental substantive and procedural rights that would have been enforced in any individual suit? The Louisiana courts cast their lot with the latter view. As Justice Scalia explained in staying the judgment, the "apparent consequence ... is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." Slip op. at 3 (Scalia, J., in chambers).

This Court's review is warranted because the decisions below conflict with longstanding methods of adjudication and with precedent governing the limited circumstances in which courts can depart from traditional one-on-one adjudication. Moreover, despite the increasing prevalence of class actions—and state courts' growing reliance on novel procedures to facilitate certification of highly individualized claims—it is rare for state-court class actions to reach this Court after a trial and final judgment. The Court should take this opportunity to

provide much-needed guidance on the due process boundaries of classwide adjudication.

I. The Louisiana Courts Departed From The Due Process Precedents Of This Court And Other Courts By Using The Class-Action Device To Abridge Fundamental Rights Available In Individual Actions

The Louisiana courts ignored the core due process safeguard—representativeness—that legitimizes class-action litigation and in doing so swept aside centuries of precedent permitting classwide adjudication only in "limited" circumstances where named plaintiffs "adequately represent[] ... the same interests" as absent class members. *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (internal quotations omitted) (citing *Hansberry* v. *Lee*, 311 U.S. 32, 41-42 (1940); see also *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1853) (named plaintiffs must "fairly represent[]" other class members). Because the courts below abrogated "well-established common-law protection[s] against arbitrary deprivations of property," there is "a presumption that [their] procedures violate[d] the Due Process Clause." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994).

A. Class Actions Comport With Due Process Only When They Permit Adjudication Of Individualized Claims And Defenses

As this Court has long recognized, "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430; see also *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 457 (1993); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277

(1855). Adherence to time-tested methods of adjudication "protect[s] against arbitrary and inaccurate adjudication" and is the very essence of due process. *Oberg*, 512 U.S. at 430; see also *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1877) (the Due Process Clause ensures "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights").

Traditionally, a plaintiff must prove the elements of his or her claim; a defendant must be allowed to dispute that proof and establish available defenses; and a factfinder must decide the controversy between the litigants before the court under established burdens of proof. See, *e.g.*, *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007); *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972). And an essential safeguard of the defendant's right to dispute proof and establish defenses is the availability of cross-examination, which ensures the defendant a full and fair opportunity to persuade the jury that it should refuse to impose liability or limit any relief. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970).

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). Because it would be inefficient to try what is effectively the same lawsuit over and over again, the claims of numerous similarly situated individuals may, in appropriate circumstances, be aggregated in a single trial in which a few named plaintiffs present proof that effectively establishes the core elements of their own and all other individuals' claims simultaneously.

Although "[s]tate courts are generally free to develop their own rules for protecting against ... the piecemeal resolution of disputes," it is well settled "that extreme applications" of this principle "may be inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797. Because "one-on-one 'traditional' modes [of adjudication] ... reflect ... the very culture of the jury trial," and "find expression in defendants' right to due process," *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (Higginbotham, J.), deviation from traditional individualized litigation is tolerated only "in certain limited circumstances" and only under specific conditions that ensure due process protections for both class members and defendants alike. *Richards*, 517 U.S. at 798 (citing *Hansberry*, 311 U.S. at 41-42).

From the earliest days of class-action litigation, this Court has held that an essential premise of the class-action procedure is that the named plaintiffs function as *representatives* of the remainder of the class. See *Smith*, 57 U.S. (16 How.) at 302-03 (in "all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried"). That is, class actions rest on the assumption that it is unnecessary to bring every claimant into court because the class representatives—and their individual claims—are effective proxies for the absent class members and their claims. It is this "class cohesion that legitimizes representative action in the first place." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). Aggregation thus does not and cannot *change* the claims asserted or the

ultimate scope of a defendant's liability; it merely avoids the burdens and inefficiencies of deciding the same claims repeatedly. "[N]o less than traditional joinder (of which it is a species)," classwide adjudication enables the trial of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). A class action is therefore "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 332 (1980).

Certain safeguards are necessary to ensure that the trial conducted through the named plaintiffs on their individual claims is representative of all class members' individual claims and allows a full and fair presentation of applicable defenses. In the federal system, these objectives are achieved principally through Rule 23's requirements of commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a)(2)-(4). And in class actions brought under Fed. R. Civ. P. 23(b)(3)—the category most analogous to plaintiffs' suit here for classwide monetary relief—common questions must "predominate over any questions affecting only individual members." This "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Moreover, in all federal class actions, the Rules Enabling Act prohibits the use of any procedural device (including the class-action procedures of Rule 23) to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Although state courts are not bound by these federal-law requirements, they are bound by the *constitutional* requirement that representative plaintiffs in a class action serve as true proxies for the remainder of the class. As this Court has emphasized, the "Due Process Clause ... *requires* that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (emphasis added); see also *Amchem*, 521 U.S. at 626, n.20 (noting that the due process adequacy-of-representation requirement tends to merge with Rule 23's typicality and commonality requirements).

This representativeness requirement is essential to the basic fairness of class-action proceedings—for defendants and plaintiffs alike. The defendant must have the opportunity to defend against *all* of the class members' claims, even though only a few plaintiffs (the class representatives) are present for trial. If, for example, many of the absent class members' claims suffer from defects that the class representatives' claims do not, then the defendant has been denied an opportunity to assert every defense and—if ordered to pay a judgment—is deprived of property without due process of law. See, *e.g.*, *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, J.). By the same token, if the named plaintiffs' claims fail because they are atypical and *weaker* than the absent class members', then—if the certified class proceeds to judgment—the absent class members have lost *their* opportunity to be heard.

This Court has recognized that traditional concepts of representation are deeply rooted in due process. In *Taylor* v. *Sturgell*, 553 U.S. 880 (2008),

for example, the Court unanimously rejected the notion of virtual representation, holding that "due process limitations" require that "[r]epresentative suits" rest on *actual* and direct representation of one party by another. *Id.* at 891, 894. The Court thus rejected the suggestion that representation need be only "close enough." *Id.* at 898. Notably, the Court specifically emphasized the representative character of "*properly conducted* class actions," and rightly placed that representative relationship on par with "suits brought by trustees, guardians, and other fiduciaries." *Id.* at 894 (emphasis added).

The absence of genuine representation divorces a class action from its foundation in our traditional adversarial system. If named plaintiffs fail to act as true proxies for the rest of the class, then the lawsuit is no longer the aggregate litigation of *individuals'* claims. It becomes instead something very different, detached from reality and the "traditional" moorings that are essential to due process. *Oberg*, 512 U.S. at 430. Once that break occurs, and the named plaintiffs are excused from their obligation to function as representatives litigating individual claims (and confronting individual defenses) typical of the class, a defendant's liability is distorted because class members are able to recover simply because they are members of the class, and not because of the merits of their individual claims.

Courts have regularly rejected such radical departures from the procedure of one-on-one adjudication established at common law, because forcing the defendant to defend against a classwide claim that differs from the class members' individual claims gives class representatives the undue "advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced

together for litigation." *Broussard*, 155 F.3d at 344-45; see also *Fibreboard*, 893 F.2d at 711 (condemning class action in which "the claim of a unit of 2,990 persons" is adjudicated instead of "the individual claims of 2,990 persons" because it will "inevitably restate[] the dimensions of tort liability").

In *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), for example, the court of appeals invalidated a plan to "estimat[e] the gross damages to the class as a whole and only subsequently allow[] for the processing of individual claims." The Second Circuit explained that the plan would "alter defendants' substantive right to pay damages reflective of their actual liability," and recognized—critically for present purposes—that permitting such a plan would "offend[]... the Due Process Clause." *Ibid.*; see also *id.* at 232 (condemning substitution of the "class as a whole" for the individual members of a class as a "fantastic procedure" that would violate "due process") (quoting *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974)); *Stonebridge Life Ins. Co.* v. *Pitts*, 236 S.W.3d 201, 206-07 (Tex. 2007) (reversing class certification premised upon "a common telemarketing effort"); *Rollins, Inc.* v. *Butland*, 951 So. 2d 860, 872 (Fla. Dist. Ct. App. 2006) (rejecting plaintiffs' attempt to prove reliance through proof of a "common scheme[]").

By the same token, courts have recognized that the Due Process Clause forbids arbitrary exactions imposed on a classwide basis that are grossly out of proportion to a defendant's actual liability to individual plaintiffs. See, *e.g.*, *Avery* v. *State Farm Mutual Auto. Ins. Co.*, 835 N.E.2d 801, 832-34 (Ill. 2005) (rejecting method of calculating aggregate

damages for a nationwide class as "so speculative and uncertain" that it violates due process because of the uncertainty concerning the degree to which the award matches the outcome of individual adjudications); *Bell* v. *Farmers Ins. Exchange*, 9 Cal. Rptr. 3d 544, 579-80 (Cal. Ct. App. 2004) (rejecting aggregate damages award lacking support in any "foundational calculations"). As the Second Circuit put it: The "systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 853 (2d Cir. 1992); see also *Southwestern Refining Co.* v. *Bernal*, 22 S.W.3d 425, 437 (Tex. 2000).

B. In Conflict With Decisions Of This Court And Other Courts, The Louisiana Courts Erroneously Jettisoned The Essential Representative Nature Of A Class Action And Abridged Rights Available In Individual Suits

The Louisiana courts refused to adhere to these fundamental limits on class actions. Instead, the courts broke with the precedent of this Court and other lower courts—as well as with centuries of traditional practice—by imposing liability through a novel procedure that failed to adjudicate *any* class member's individual claim, representative or otherwise. The result was a class action in name only—a lawsuit that fundamentally altered the plaintiffs' burden of proving their underlying fraud-based claims, deprived defendants of a trial on critical components of their defenses, abridged

defendants' fundamental right to cross-examine the class representatives, and imposed a wholly arbitrary damages award untethered to any finding of actual liability.

1. Most egregiously, the courts below transformed hundreds of thousands of individual tort claims into a single "claim" purportedly asserted by "the class as a whole" to excuse plaintiffs from proving reliance or causation as to any class member. And the Louisiana courts applied this novel "class as a whole" theory—which had no prior basis in Louisiana authority (see note 1, *supra*)—without prior notice to defendants. Cf. *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964) (state court's "unforeseeable and retroactive" interpretation of legal requirements violated due process). In particular, the trial court instructed the Phase I jury that plaintiffs did "not have to establish individual reliance," even though such proof "usually" would be required under Louisiana law. 2003-07-24 Tr. 23506; see also App. 201a, 222a. The Court of Appeal likewise concluded that, although plaintiffs had not established detrimental reliance as to any class member, "reliance" by "the class as a whole" was sufficient. App. 46a. That worked a complete denial of the basic guarantee that class actions adjudicate representative *individual* claims. Here, the act of aggregation gave plaintiffs fundamentally different and better claims than any individual plaintiff possessed. The Louisiana courts thus approved a class action that did not *aggregate* the plaintiffs' individual claims—each of which required proof of individual reliance and causation—but rather *transformed* them into a disembodied, abstract claim that rendered the conduct and circumstances of actual class members irrelevant. See *Fibreboard*,

893 F.2d at 710, 712 (expressing "profound disquiet" over aggregation procedure that "lift[s] the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation" and condemning such a procedure as "something other than a trial within our authority"). The whole of plaintiffs' burden was rendered far less than the sum of its parts.

Having converted thousands of individual claims into a single claim as to which the concept of representative litigation retained no meaning, the courts below also had to remake the essence of the claim itself. Plaintiffs' original pleading asserted, consistent with Louisiana law, that defendants had directly misled each of the named plaintiffs—as well as each of the other hundreds of thousands of class members—about the health risks of smoking. R.1:20-21 (Pls.' Pet. ¶¶ 41, 45, 48). The claim eventually asserted by the "class as a whole," however, was based on the notion that, over a span of nearly five decades, defendants had caused a "distortion of the body of public knowledge." By eliminating the need to prove any individual class member's reliance on the "distortion" (much less on identifiable misstatements or omissions), the lower courts created the very antithesis of representative litigation: the lawsuit failed to decide the claims of *any* class member. Instead, it devolved into an abstract inquiry regarding the "body of public knowledge," with no attempt to show that the named plaintiffs or any other identifiable class member had been affected by defendants' conduct. The named plaintiffs were no longer representing other individual class members—or even, for that matter, themselves.

Moreover, following completion of the Phase I trial, the trial court summarily invalidated various individualized affirmative defenses. For example, the lower courts ruled that the individualized defense of prescription, which hinges on what each plaintiff knew and when, was categorically inapplicable because "[t]he jury's findings that defendants intentionally withheld information from *the general public* as to the addictive nature of their products ... constitutes a continuing tort." App. 53a-54a (emphasis added); see also App. 211a-13a, 222a. Thus, expressly relying on its invented theory that a "public distortion" affected the "class as a whole," the Court of Appeal nullified the individualized prescription defense as to all class members, even those (such as both class representatives) who knew the risks of smoking years before the suit was filed.[4]

The Louisiana courts' use of the class-action device to transform plaintiffs' individual claims into a single class-as-a-whole claim—and their corresponding nullification of defendants' individualized defenses—cannot be reconciled with the traditional common-law requirements of representative adjudication. See *Smith*, 57 U.S. (16 How.) at 302-03. The rulings below also cannot be reconciled with numerous decisions holding that a class action (like common-law joinder) "leaves the parties' legal rights and duties intact," *Shady Grove Orthopedic Associates*, 130 S. Ct. at 1443 (plurality opinion); see also, *e.g.*, *McLaughlin*, 522 F.3d at 232; *Broussard*,

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[4] By their own pretrial admissions, the named plaintiffs had actual notice of their alleged addiction well outside the one-year period of prescription. See page 6, *supra*; see also La. C.C. art. 3492.

155 F.3d at 345, and further contravene prohibitions against the imposition of arbitrary and irrational classwide relief, see *Avery*, 835 N.E.2d at 832-34. All of these precedents embody a basic constitutional principle: "due process requires that class actions not be used to diminish the substantive rights of any party to the litigation" (*Stonebridge*, 236 S.W.3d at 205; *Bernal*, 22 S.W.3d at 437 (same))—a principle squarely rejected by the Louisiana courts below.

Most federal and state courts have thus refused to certify mass tort cases as class actions *precisely because* of the highly individualized nature of tort claims. That is especially true in cases involving putative class actions brought by smokers. See, *e.g.*, *Barnes* v. *American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano*, 84 F.3d at 746-50; *Estate of Mahoney* v. *R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150 (S.D. Iowa 2001); *Badillo* v. *American Tobacco Co.*, 202 F.R.D. 261 (D. Nev. 2001); *Arch* v. *American Tobacco Co.*, 175 F.R.D. 469, 488-89 (E.D. Pa. 1997); *Philip Morris, Inc.* v. *Angeletti*, 752 A.2d 200, 238-39 (Md. 2000). The Louisiana courts could permit what these numerous other courts forbade only by eliminating the basic representational premise of the class action and using it as a device to adjudicate claims in a way that no individual litigant ever could.[5]

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[5] In the lower courts, plaintiffs occasionally sought to analogize their case to actions certified under Fed. R. Civ. P. 23(b)(2), which permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Ibid.* The analogy is baseless. As the Court of Appeal acknowledged (App. 42a-43a), plaintiffs are *not* seeking "final

2. The Louisiana courts' "novel approach to class-action liability" (slip op. at 4 (Scalia, J., in chambers)) did not stop at merely transmuting hundreds of thousands of individual claims into a single claim brought by the "class as a whole" and depriving defendants of a trial on crucial defenses. The trial court magnified these errors—and underscored the fact that the class action here was anything but representative litigation—by prohibiting defendants from cross-examining the class representatives on essential elements of their individual claims, affirmative defenses, and their entitlement to relief. For example, Scott and Jackson both admitted during discovery that they had started and continued smoking for reasons unrelated to anything defendants had said or done, and that they had stopped smoking long before trial. These admissions conclusively established that neither class representative could prove reliance or causation—which were indisputably elements of liability under Louisiana law—or had any need for cessation relief. See page 6, *supra*. And Scott and Jackson both admitted facts demonstrating that their claims were time-barred. *Ibid.*

Remarkably, the trial court prohibited defendants from presenting these (and other) admissions to the jury by barring any meaningful cross-examination of

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injunctive relief or corresponding declaratory relief" but rather the *legal* remedy of the costs of smoking cessation treatment. Moreover, as noted above, plaintiffs alleged a broad diversity of acts and omissions by different defendants at various times over nearly half a century—allegations that preclude any finding that defendants "acted or refused to act" uniformly with respect to class members, as required by Rule 23(b)(2).

the class representatives. As explained above, the trial court ruled that such "individualized" inquiries were irrelevant to establishing liability. See 2003-03-24 Tr. 16857-58 (disallowing questions "having to do with individualized issues"); see also 2003-03-27 Tr. 17396; 2003-03-31 Tr. 17516-17. The Court of Appeal agreed, concluding that it made no difference why the class representatives began and continued smoking, whether they relied on any supposed misstatements or omissions, whether they were addicted, or why they stopped smoking. The Court of Appeal even reached the astonishing conclusion that the denial of cross-examination was "harmless error." App. 48a-49a.

It is hard to imagine a more fundamental deviation from the model of representative litigation than a case in which defendants are denied a full and fair opportunity to cross-examine the class representatives. Class representatives are the linchpin of the fairness of a class action. Here, for example, massive liability was imposed for *smoking cessation* even though both class representatives had *ceased smoking* long before trial. In any representational litigation worthy of the name, that fact would have been front and center before the jury through cross-examination. Here, it was deemed *irrelevant*. The Court of Appeal's conclusion that the weaknesses of the named plaintiffs' claims had no bearing on this case demonstrates just how far the lower courts departed from traditional methods of adjudication.

Numerous courts have recognized that effective cross-examination of class representatives is an essential component of a legitimate class action. In *Small* v. *Lorillard Tobacco Co.*, 252 A.D.2d 1 (N.Y. App. Div. 1998), for example, the appellate court denied certification to a proposed class of smokers

precisely because individual questions of reliance and causation made the necessary cross-examination impractical. *Id.* at 12 ("proposed class action would be unmanageable because ... [d]efendants have a *due process right to cross-examine each member*, a task that would take hundreds of years") (emphasis added); see also *Barnes*, 161 F.3d at 145-46; *Broussard*, 155 F.3d at 344-45; *Arch*, 175 F.R.D. at 489 n.21. As Judge Wilkinson explained in reversing class certification in *Broussard*, forcing a class-action defendant "to defend against a fictional composite" denies him "the benefit of ... cross-examining the disparate individuals behind the composite creation." 155 F.3d at 344-45.[6]

II. The Question Presented Is Of National Importance

Preserving the essential representative function of class actions is a matter of nationwide significance. As Justice Scalia observed in granting

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[6] Once this class action was divorced from the representative function that this Court's precedents demand of aggregate litigation, further deviations and departures from longstanding methods of civil adjudication were all but inevitable. As noted above (at pages 9, 11-12 & n.2, *supra*), the Court of Appeal, piling due process error upon due process error, simply conjured up the number of plaintiffs whose claims had accrued and then speculated that 100% would use the judicially curtailed cessation remedy. The resulting total disconnect between the massive $270 million award and any actual liability was a textbook illustration of arbitrary decisionmaking—albeit a predictable consequence of the Louisiana courts' wholesale abandonment of representational litigation. Cf. *McLaughlin*, 522 F.3d at 231 (an order to pay must be "reflective of [defendants'] actual liability"); *Walls* v. *Miss. State Dep't of Pub. Welfare*, 730 F.2d 306, 326 (5th Cir. 1984) (same).

a stay in this case, "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." Slip op. at 3. Class actions pose a danger that the "systemic urge to aggregate litigation" will, as here, trump "individual justice." *In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 373 (2d Cir. 1993) (citing *Brooklyn Navy Yard*, 971 F.2d at 853).

Class actions occupy an increasingly prominent role in the modern legal landscape. They directly affect tens of millions of Americans who find themselves members of a class in connection with the most ordinary purchases or activities. See Lee & Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, at 1 (2008) (noting 72% increase in class-action activity between 2001 and 2007). This case is illustrative. The certified class was estimated to include more than 500,000 members. See also *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc) (upholding certification of class estimated by the district court to encompass 1.5 million female Wal-Mart employees advancing employment discrimination claims), pet. for cert. filed, 79 U.S.L.W. 3128 (Aug. 25, 2010) (No. 10-277). Class actions also indirectly affect countless more consumers who ultimately bear the enormous costs imposed on the economy by misconceived or meritless class-action litigation—burdens that will only increase if the highly unorthodox proceedings and judgment below are permitted to stand. Confining class actions to their constitutionally permissible boundaries is thus a matter of the utmost importance.

As class actions have expanded to encompass ever larger classes and ever more disparate claims, many

courts have tried to accommodate these gargantuan creations by resorting to procedures that depart from traditional modes of adjudication. These attempts have included segmented proceedings, in which questions of liability (often cast in highly generalized terms bearing little resemblance to traditional legal categories) are subdivided into multiple phases and further separated from remedial questions, with different factfinders sometimes assigned to different phases. See, *e.g.*, *Perrine* v. *E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 837-38 (W. Va. 2010); *State ex rel. Chemtall Inc.* v. *Madden*, 655 S.E.2d 161, 167 (W. Va. 2007). Other courts have carved up cases by certifying "issue" classes designed to extract common questions from their individualized surroundings. See, *e.g.*, *Pella Corp.* v. *Saltzman*, 606 F.3d 391 (7th Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3149 (Sept. 13, 2010) (No. 10-355); *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246, 1256-58 (Fla. 2006). Still other courts have, like the decisions below, attempted to reconceptualize the theory of liability as running to the "class as a whole" in an effort to define away the individualized components of the class members' claims. See, *e.g.*, *Schwab* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), rev'd sub nom. *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); see also Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 101, 103 (2009) (noting the "deep and increasingly important trend" toward such conceptual battles at the class-certification stage). Similarly, other courts have attempted to make classwide determinations of liability or damages by extrapolating from a handful of individual data points. *E.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 195 (1st

Cir. 2009); *Cimino* v. *Raymark Indus.*, 151 F.3d 297, 317-19 (5th Cir. 1998); *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 782-83 (9th Cir. 1996).

State courts—which lack the uniform protections of Rule 23 and the Rules Enabling Act—have been particularly fertile ground for class actions that deviate from traditional modes of adjudication. Indeed, in enacting the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), Congress specifically noted the precipitous increase in class actions filed in state courts in which "the governing rules are applied inconsistently[,] ... frequently in a manner that contravenes basic fairness and due process considerations." S. Rep. No. 109-14, at 4 (2005); see also *id.* at 14 (observing that state courts are often less faithful to the procedural requirements "intended to protect the due process rights of both unnamed class members and defendants"). CAFA partially addresses that problem by expanding federal removal jurisdiction over multistate class actions, thereby channeling such actions into the federal system.

As Justice Scalia noted in granting a stay (slip op. at 3-4), however, CAFA does not provide federal court jurisdiction over many class actions in which more than two-thirds of the members of the proposed class are citizens of the forum state. 28 U.S.C. § 1332(d)(4); see also *id.* § 1332(d)(3) (permitting district courts to decline jurisdiction over certain class actions where between one-third and two-thirds of the members are citizens of the forum state and certain considerations are present). Even where CAFA's home-state exception does not apply, removal to federal court is far from a foregone conclusion. See, *e.g.*, *Tanoh* v. *Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (applying general

presumption against removal over defendant's objection that plaintiffs filed copycat suits to evade federal removal jurisdiction under CAFA's "mass action" provisions). Thus, despite Congress's concern with inconsistent and abusive state-court practices, the opportunities for abuse persist unabated where, as here, a class comprises citizens of a single state.

Finally, establishing proper constitutional limits on state class actions is especially important because certification of a large class action produces an all-but-overwhelming incentive to settle. The risk of error is compounded by the sheer number of claims aggregated in a single action. See *Thorogood* v. *Sears, Roebuck & Co.*, 2010 WL 4286367, at *6-8 (7th Cir. Nov. 2, 2010). Large class actions are often bet-the-company cases, and class-action defendants can rarely tolerate the crippling liability risk of a single, massive verdict. See, *e.g.*, Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) (the "overwhelming majority" of certified class actions result in settlements). As this Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). This phenomenon led the normally reticent Judge Friendly to condemn class settlements induced by the small probability of an immense judgment as legalized "blackmail." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

The high-stakes nature of class-action litigation means that procedural guarantees, like the ability to cross-examine the class representative and to

present applicable defenses, must be scrupulously observed. Here, the class-action device was the excuse for eliminating those guarantees altogether. If the constitutional requirement of representativeness is jettisoned, due process error upon due process error are sure to result.

III. This Case Is An Ideal Vehicle For Resolving The Due Process Issue

This case presents a rare opportunity for review of a class action tried to final judgment and stands in an ideal posture for determining the minimum standards that the Due Process Clause places on class actions. The record is fully developed after a two-phase trial on the merits, and defendants have exhausted their appeals in the Louisiana courts, resulting in a series of published opinions. As explained above, it is unusual that defendants can afford to bear the risks of trial and appeals once a massive class has been certified. Consequently, this Court has precious few opportunities to review the merits of a class action tried to a final judgment.

The comprehensive record below leaves no doubt, moreover, concerning the Louisiana courts' position on the question raised in this petition. Defendants asserted their due process objections at every stage of the litigation—including repeatedly seeking decertification when further proceedings confirmed that the plaintiffs' claims were highly individualized—but were rebuffed at every turn. They pressed their due process challenges at all necessary junctures in the trial court; in two separate appeals to the Louisiana Court of Appeal; and then in two successive petitions for review in the Louisiana Supreme Court. The Louisiana courts have had every opportunity to rectify the due process problems

infecting the trial and judgment but have pointedly refused to do so, instead ordering defendants to pay the $270 million judgment immediately (a directive now stayed by Justice Scalia). See, *e.g.*, App. 9a, 45a-49a. And there can be no doubt that the constitutional question presented is essential to validity of the judgment below and the outcome of this case.

The opportunity to review a class action arising out of state court is particularly rare. In federal court, Rule 23(f) allows the interlocutory appeal of class-certification orders, affording a far shorter path to potential review by this Court on that fundamental threshold issue. With state class actions, by contrast, obtaining this Court's review is far more difficult. Plaintiffs often assert, for example, that any judgment is not sufficiently final to support this Court's jurisdiction under 28 U.S.C. § 1257(a). Indeed, plaintiffs did exactly that when defendants filed a certiorari petition in 2008. Moreover, federal cases are unlikely to supply comprehensive guidance on due process issues because they are often resolved based on interpretation of particular provisions of Rule 23 or the Rules Enabling Act without addressing underlying due process principles. See, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172 n.10 (1974) (declining to reach constitutional questions).

This case perfectly illustrates the enormous time, expense, and uncertainty defendants face in bringing a state class action to an ultimate conclusion that is fully ripe for this Court's review. Defendants have sought to vindicate their due process rights in the state courts for more than a decade, expending massive resources and facing enormous liability before finally being able to present their constitutional challenges to this Court. Defendants had little choice but to follow this long and tortuous

path to obtain review in a federal forum. But few defendants will be willing or able to go the distance and, as here, present this Court with a comprehensive record of the treatment given to due process claims in state class actions. This case therefore presents a valuable opportunity for this Court to clarify the due process standards that apply in state class actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 2, 2010

APPENDIX

APPENDIX A

Court of Appeal of Louisiana,
Fourth Circuit

No. 2009-CA-0401.

Gloria SCOTT and Deania M. Jackson, on Behalf of Themselves and All Other Persons Similarly Situated

v.

AMERICAN TOBACCO COMPANY, INC.; American Brands, Inc.; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Brown & Williamson Tobacco Corporation; Batus, Inc.; Batus Holdings, Inc.; Philip Morris, Inc.; Philip Morris Companies, Inc.; et al.

April 23, 2010.
Rehearing Denied May 12, 2010.

P. Bruno, David S. Scalia, Bruno & Bruno, Robert L. Redfearn, Robert L. Redfearn, Jr., Simon, Peragine, Smith & Redfearn, L.L.P., *Raul R. Bencomo,* Bencomo & Associates, *Russ M. Herman, Stephen J. Herman,* Herman, Herman, Katz & Cotlar, LLP, *Deborah M. Sulzer, Stephen B. Murray, Stephen B. Murray, Jr.,* Murray Law Firm, *Walter J. Leger, Jr. Leger & Mestayer, Meyer H. "Mike" Gertler, Louis L. Gertler,* Gertler, Gertler, Vincent & Plotkin, L.L.P., New Orleans, LA, *Kenneth M. Carter,* Kenneth M. Carter, PLC, St. Francisville, LA, *Jack M. Bailey, Jr., W. James Singleton,* Singleton Law Firm, Shreveport, LA, *Daniel E. Becnel, Jr.,* Law Office of Daniel E. Becnel, Jr., Reserve, LA, *Bruce C. Dean,* Bruce C. Dean, LLC, Metairie, LA, *Paul H. Due',* Due', Price, Guidry, Piedrahita & Andrews, Baton Rouge, LA, *Michael X. St. Martin,* St. Martin & Williams, Houma, LA, *Calvin C. Fayard, Jr.,* Fayard & Honeycutt, Denham Springs, LA, for Plaintiffs/Appellees.

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Carmelite M. Bertaut, Stone Pigman Walther Wittmann L.L.C., New Orleans, LA, *Richard A. Schneider,* King & Spalding LLP, Atlanta, GA, for Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc., individually and as successor by merger to The American Tobacco Company).

(Court composed of Judge *DENNIS R. BAGNERIS, SR.,* Judge *MAX N. TOBIAS, JR.,* Judge *DAVID S. GORBATY,* Judge *ROLAND L. BELSOME,* Judge *PAUL A. BONIN*).

PAUL A. BONIN, Judge.

The "tobacco companies"[1] suspensively appeal[2] the Amended Judgment rendered on July 21, 2008 in this class action matter which ordered them to deposit into the court's registry the full amount of $263,532,762 with legal interest from June 30, 2004, until paid, in order to fund a court supervised comprehensive smoking cessation program. Ms. Deania Jackson[3] timely filed an answer to the appeal. La. C.C.P. art. 2133 A. For the reasons which follow, we amend the judgment and, as amended, affirm.

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[1] The reference is to the appellants: Phillip [sic] Morris USA Inc., The Tobacco Institute, Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, and Brown & Williamson Tobacco Company (now known as Brown & Williamson Holdings, Inc., individually and as successor by merger to The American Tobacco Company).

[2] *See Scott v. American Tobacco Co., Inc.,* 08-1140 (La.App. 4 Cir. 11/17/08) (unpublished).

[3] Ms. Jackson is the class representative who filed the answer to the appeal individually and as representative of the certified class.

I

This court decided an earlier appeal brought by the tobacco companies in *Scott v. American Tobacco Co., Inc.*, 04-2095 (La.App. 4 Cir. 2/7/07), 949 So.2d 1266, *rehearing denied, writ denied,* 07-0654, 973 So.2d 740 (La.1/7/08), *writ denied,* 07-0662 (La.1/7/08), 973 So.2d 740, *cert. denied,* --- U.S. ----, 128 S.Ct. 2908, 171 L.Ed.2d 842 (2008). We refer to that decision as *Scott I.*[4] The jury had tried the case in two phases, from June 18, 2001, through May 21, 2004, pursuant to former La. C.C.P. art. 593.1 and in accordance with Case Management Order # 2, Trial Order No. 5, the Order of the Louisiana Supreme Court (*Scott v. American Tobacco,* 02-2449 (La.11/15/02), 830 So.2d 294), and Trial Order No. 10.

On the appeal of *Scott I,* after treating the tobacco companies' eleven assignments of error, we remanded the matter to the trial court for further proceedings. After the finality of *Scott I,* the trial court rendered an amended judgment, which the trial court concluded was "in accord with the dictates

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[4] We are cognizant of the use of the term "Scott I" in the Louisiana Supreme Court's decision on a writ in *Scott v. American Tobacco Co.*, 02-0770, p. 1 (La.3/28/02), 814 So.2d 544, 545. In that decision, the court's reference to "Scott I" was to another writ that had been previously decided by the Louisiana Supreme Court in the case, *Scott v. American Tobacco Co.*, 01-2498 (La.9/25/01), 795 So.2d 1176. Our present reference to "Scott I" is meant only to refer to our prior decision in *Scott v. American Tobacco Co., Inc.*, 04-2095 (La.App. 4 Cir. 2/7/07), 949 So.2d 1266, *rehearing denied, writ denied,* 07-0654, 973 So.2d 740 (1/7/08), *writ denied,* 07-0662 (La.1/7/08), 973 So.2d 740, *cert. denied,* --- U.S. ----, 128 S.Ct. 2908, 171 L.Ed.2d 842 (2008).

of the Court of Appeal. . . ."[5] In that judgment, which is the subject of this appeal, the trial court mandated that the tobacco companies fully fund the four components[6] of the smoking cessation program authorized in *Scott I*, which totaled $251,013,580 plus an additional five-percent administrative fee of $12,549,179. Also, the trial court ordered post-judgment interest on the entire amount from June 30, 2004, which was the date of its earlier judgment appealed from in *Scott I*.

The tobacco companies assign four errors. They complain that the amended judgment incorporates errors of its original judgment which were "left intact" by our decision in *Scott I*. We address this assignment in Part II. They also complain that their Due Process rights have been violated by the refusal of the trial court to empanel a new jury to determine the issues remanded to the trial court. We address this assignment in Part III. A third complaint is that the award is excessive because the trial court condemns them to pay for program components which we ruled in *Scott I* were not recoverable by the class. We address this assignment in Part IV. Their final complaint is that the trial court erred in awarding post-judgment interest and in the date selected from which interest is to be calculated. We address this assignment in Part VI.

Ms. Jackson, as the class representative, assigned five errors. She first contends that the trial

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[5] Reasons for Judgment, page 1, July 21, 2008.

[6] The four components are (1) reimbursement of smoking-cessation related medication, (2) telephone quit lines, (3) health intervention systems, and (4) intensive cessation programs.

court's Amended Judgment is legally correct and should be affirmed. But, out of an abundance of caution, if the tobacco companies are to obtain relief on their assignment of error in which they urge us to revisit our decision in *Scott I*, then she too seeks to preserve her right to relief from our judgment in these particulars: (a) legal interest from the date of judicial demand[7] should be awarded, (b) the comprehensive smoking-cessation program should include all twelve components proved at trial, (c) the tobacco companies should be ordered to deposit a sum of money for funding the court-supervised cessation program, (d) amendment should provide that the tobacco companies' product was defective in design both prior to and after September 1, 1988, and provide that the "exclusivity" provisions of the Louisiana Products Liability Act (LPLA) do not insulate the tobacco companies from post-1988 conduct in this case, and (e) the judgment should provide that medical monitoring is reasonably necessary. We address all of her assignment in Part II.

II

The central jury holding of *Scott I* is that the tobacco companies

> . . . individually and conspiring with each other, knowingly and deliberately conspired to commit, and did commit fraud that spanned five decades, directly causing injury to the class of Louisiana smokers . . . [and that they] knowingly and deliberately addicted the population of Louisiana

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[7] That date is May 24, 1996.

> smokers to a product known to them to be both addictive and extremely toxic.

Scott I, supra, at p. 12, 949 So.2d at 1276.

Based upon that finding, we meticulously reviewed the jury's findings and determinations and reached conclusions that some, but not all, of the jury's findings were supportable. Despite the parties' requests, we decline to revisit those issues settled by us in *Scott I* unless we have been shown to be in palpable error or our ruling was manifestly unjust. The doctrine or principle known as "the law of the case" guides us in determining whether to re-visit issues which were decided by this court on the earlier appeal in this case.

The law of the case doctrine is discretionary. *Lejano v. Bandak*, 97-0388 (La.12/12/97), 705 So.2d 158. "The law of the case" doctrine or principle[8] refers to

> (a) the binding force of trial court rulings during later stages of the trial, (b) *the conclusive effects of appellate court rulings at the trial on remand, and* (c) *the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal in the same case.*

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[8] *Reed v. St. Charles General Hosp.*, 08-0430, pp. 9-10 (La.App. 4 Cir. 5/6/09), 11 So.3d 1138, 1145, refers to it as both a "doctrine" and a "principle"; *Bank One, supra*, refers to it as a "doctrine," 04-2001 at p. 5, 917 So.2d at 458; *Jones v. McDonald's Corp.*, 97-2287, p. 4 (La.App. 1 Cir. 11/6/98), 723 So.2d 492, 494, calls it a "principle"; *Keaty v. Raspanti*, 96-2839 (La.App. 4 Cir. 5/28/97), 695 So.2d 1085, 1087, calls it a "doctrine"; *Moore v. Kenilworth/Kailas Properties*, 07-0346, p. 8 (La.App. 4 Cir. 2/13/08), 978 So.2d 475, 480, calls it a "doctrine," and a "principle," 07-0346 at p. 8, 978 So.2d at 480.

Bank One, N.A. v. Velten, 04-2001, pp. 5-6 (La.App. 4 Cir. 8/17/05), 917 So.2d 454, 458 (emphasis added), citing *Petition of Sewerage and Water Bd. of New Orleans*, 278 So.2d 81, 83 (La.1973). This doctrine "may bar redetermination of a question of law or a mixed question of law and fact during the course of a judicial proceeding." 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure*, § 6.7 (1999); *Bank One, supra.* The law of the case doc-trine, rather than *res judicata,* is the proper legal principle for describing the relationship between prior judgments by trial and appellate courts rendered within the same case. *Bank One,* 04-2001 at p. 6, 917 So.2d at 458-59.[9] *See Reed v. St. Charles General Hospital,* 08-0430, pp. 9-10 (La.App. 4 Cir. 5/6/09), 11 So.3d 1138, 1145-46.

The policy reasons behind this doctrine include avoidance of re-litigation of an issue, consistency of result in the same litigation, and promotion of efficiency and fairness to the parties "by affording a single opportunity for the argument and decision of the matter at issue." *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 260 La. 325, 330, 256 So.2d 105, 107 (La.1971); *Bank One, supra.*

While the law of the case doctrine as a general rule precludes reconsideration of a court's previous

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[9] Earlier in this case, the U.S. Supreme Court denied writs taken from the Louisiana First Circuit, --- U.S. ----, 128 S.Ct. 2908, 171 L.Ed.2d 842 (2008), *sub nom. Philip Morris U.S.A., Inc. v. Jackson.* Therefore we note First Circuit cases defining the law of the case principle: *Louisiana Land and Exploration Co. v. Verdin*, 95-2579, pp. 3-4 (La.App. 1 Cir. 9/27/96), 681 So.2d 63, 65; *Brumfield v. Dyson*, 418 So.2d 21, 23 (La.App. 1 Cir.1982).

determination of an issue on a prior appeal, the doctrine is inapplicable in cases of palpable error or where manifest injustice would occur. *Keaty v. Raspanti*, 96-2839, p. 4 (La.App. 4 Cir. 5/28/97), 695 So.2d 1085, 1087 (citing *Dodson v. Community Blood Center*, 93-3158 (La.App. 1st Cir.1993), 633 So.2d 252, 255, and cases cited therein); *Moore v. Kenilworth/Kailas Properties*, 07-0346, p. 8 (La.App. 4 Cir. 2/13/08), 978 So.2d 475, 480; *Jones v. McDonald's Corp.*, 97-2287, pp. 4-5 (La.App. 1 Cir. 11/6/98), 723 So.2d 492, 494; *Glenwood Hospital, Inc. v. Louisiana Hospital Service, Inc.*, 419 So.2d 1269, 1271 (La.App. 1st Cir.1982).

Although the parties have made plain their dissatisfaction and disappointment in some of our prior rulings, no party has pointed to any palpable error in *Scott I*; no party has shown any manifest injustice or demonstrated to us that our prior rulings have done anything other than lawfully guide the parties and the trial court in providing a just remedy for the Louisiana smokers who have been knowingly and willfully addicted to tobacco by the acts and omissions of the tobacco companies. We are satisfied that on the prior appeal we "fully and properly considered" the issues. *See Hutchison v. Murphy Oil USA, Inc.*, 04-2648, p. 1 n. 2 (La.1/14/05), 892 So.2d 569, 570 (Calogero, C.J., concurring in the denial of certiorari). To the extent that the parties seek in their assignments of error for us to reverse our prior rulings in *Scott I*, we apply the doctrine of "the law of the case" and, being shown no palpable error or manifest injustice, we decline to revisit those issues.

III

In this part we address the tobacco companies' specific Due Process claim about the failure of the trial court to empanel a new jury to make findings of fact with regard to the issues remanded by us to the trial court. The tobacco companies frame their complaint as arising from the trial court's depriving them of a *new* trial by jury. This new jury, the companies argue, would hear facts which are now relevant because the decision in *Scott I* clarified and, more importantly in the companies' argument, necessarily and materially reduced the number of beneficiaries eligible for the program. Moreover, the tobacco companies argue, because *Scott I* eliminated other program components which were designed to increase "utilization rates" of the surviving four approved components, the new jury must be permitted to determine anew evidence of expected or probable lower utilization rates for the reduced number of beneficiaries. The companies contend that the deprivation of such a new trial by jury deprives them of the constitutional protections afforded them under the federal Due Process clauses and Louisiana's parallel protections. The Due Process clause of the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." The protections of that clause apply to the states under the Fourteenth Amendment, which states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

In evaluating the tobacco companies' claim that the denial of another jury trial in this state civil

proceeding violates their Due Process rights, we initially observe that the protection afforded by the Seventh Amendment to civil trial by jury in the courts of the United States is not one of the rights applied to the states under the Due Process provisions of the Fourteenth Amendment. *Melancon v. McKeithen*, 345 F.Supp. 1025, 1027, 1035-45 (E.D.La.), *aff'd sub nom. Mayes v. Ellis*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214 (1972), and *Hill v. McKeithen*, 409 U.S. 943, 93 S.Ct. 290, 34 L.Ed.2d 214 (1972); *Rudolph v. Massachusetts Bay Ins. Co.*, 472 So.2d 901, 904-05 (La.1985). Our Supreme Court in *Brewton v. Underwriters Ins. Co.*, 02-2852, p. 4 (La.6/27/03), 848 So.2d 586, 588-89, explained: "The right to jury trials in civil cases is not so fundamental to the American system of justice as to be required of state courts by the due process clause of the Fourteenth Amendment." Therefore, at the outset, we reject any implied contention by the tobacco companies that their federal due process rights have been violated because the trial court refused to empanel a new jury on remand.

Thus, we are left to consider whether the denial of a jury trial on remand violates La. Const. art. I, § 2, which provides the following protections: "No person shall be deprived of life, liberty, or property, except by due process of law." Our consideration of the companies' claim that denial of a new jury trial violates their state constitutional rights is limited to their precise claim raised at the trial court level. *See Mosing v. Domas*, 02-0012 (La.10/15/02), 830 So.2d 967; *Vallo v. Gayle Oil Co.*, 94-1238 (La.11/30/94), 646 So.2d 859. We are not at liberty to consider claims of constitutional violations first raised, or later revised, in the appellate court. *Council of City*

of New Orleans v. Washington, 09-1067, pp. 3-4 (La.5/29/09), 9 So.3d 854, 856-57 (citing *inter alia Johnson v. State*, 02-2382, p. 4 (La.5/20/03), 851 So.2d 918, 921; *Geiger v. State ex rel. Department of Health and Hospital*, 01-2206, p. 11 (La.4/12/02), 815 So.2d 80, 86).

Unlike our national constitution, our state constitution makes no express provision for a right to trial by jury in civil cases, except in expropriation proceedings. La. Const. art. V, § 10; *see also* Lee Hargrave, *The Louisiana State Constitution: A Reference Guide* 27 (Greenwood Press 1991). "Reflecting the state's civil law background," Professor Hargrave observes, "the constitution has no parallel to the federal Seventh Amendment, which guarantees jury trial in most civil cases." *Id.*

Although the former Louisiana Constitution of 1921, art. VII, § 41, obliquely provided for civil jury trials,[10] that provision was omitted from the current constitution. In contrast to the overall state constitutional silence about civil jury trials, the current Louisiana Constitution does explicitly provide for criminal jury trials. La. Const. art. I, § 17. However, even in criminal jury trials, Louisiana

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[10] See, for instance, application of that pro-vision in *Peterson v. Continental Can Co*, 194 So.2d 171, 172 (La.App. 2nd Cir.1967). Art. VII, § 41 of the 1921 Louisiana Constitution stated in pertinent part: "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases." That section more famously excluded women from the general venire pool, and the section was removed in its entirety from the 1974 Louisiana Constitution. *See also Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts*, Vol. 14B, pp. 959-62.

law does not afford great deference to the traditional common law jury trial right. Louisiana is in the notable minority in not requiring unanimous twelve-person juries in non-capital cases. *See Duncan v. Louisiana,* 391 U.S. 145, .88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *see also* La.C.Cr.P. art. 782 A and *State v. Bertrand,* 08-2215 (La.3/17/09), 6 So.3d 738; *State v. Taylor,* 09-0041, p. 8 (La.App. 4 Cir. 9/4/09), 21 So.3d 421, 426.[11] Louisiana only required unanimous six-person juries when required by a ruling of the United States Supreme Court. *See Burch v. Louisiana,* 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979).

Civil jury trials are addressed, however, in our Code of Civil Procedure. To the question, La. C.C.P. art. 1731 A provides that "Except as limited by Article 1732, the *right* of trial by jury is recognized." (Emphasis added.)[12] Louisiana case law and our legal scholars affirm the right as a secure structure in our state judicial system. The "right" to trial by jury in civil cases in Louisiana is "a basic right and should be protected in the absence of specific authority for its denial." *Brewton, supra,* 02-2852 at p. 4, 848 So.2d at 589 (citing *Champagne v. American S. Ins. Co.,* 295 So.2d 437 (La.1974)). *See also* Maraist and Lemmon, 1 Louisiana Civil Law Treatise, supra, at § 11:2 Jury Trials. "The right to a

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[11] For an historical discussion of the constitutionality of Louisiana's treatment of non-unanimous jury verdicts, see State v. Barbour, 2010 WL 1136505, 09-1258 (La.App. 4 Cir. 3/24/10), 35 So.3d 1142 (Belsome, J., concur-ring), and State v. Williams, 09-602 (La.App. 4 Cir. 1/27/10), 26 So.3d 321 (unpublished) (Belsome, J., concurring).

[12] None of the expressed exceptions in La. C.C.P. art. 1732 are pertinent to this discussion.

jury trial is favored in the law and any doubtful statutory provision should be liberally construed in favor of granting a jury trial." *Pugeau v. Hebert,* 00-0875, p. 2 (La.5/12/00), 760 So.2d 325, 326. *See also Parker v. Rowan Cos.,*. 628 So.2d 1108, 1110 (La.1991) (stating that a jury trial right is "fundamental in character and courts should indulge in every presumption against a waiver, loss, or forfeiture of that right").

Nonetheless, in evaluating the tobacco companies' contention about the deprivation of a *Louisiana* right to trial by jury, it is helpful to contrast the kind of right which is protected under the state's protections with the protected federal right, which as we have already stated is not implicated in this matter. The federal right to trial by jury in a civil case pursuant to the Seventh Amendment is articulated and absolute. Under federal law, there is no appellate review of facts, thus enhancing the fact-finding authority or province of the jury. Mr. Justice Story stated in *Parsons v. Bedford, Breedlove & Robeson,* 28 U.S. 433, 438-39, 3 Pet. 433, 7 L.Ed. 732 (1830):

> No fact, tried by a jury, shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law. This is a prohibition to the courts of the United States to re-examine any facts tried by a jury, in any other manner.

28 U.S. at 444-49, 3 Pet. 433 (1830). *See Ellis v. Weasler Engineering, Inc.,* 258 F.3d 326, 332-33 (5th Cir.2001) (and numerous cases cited therein); *Wright v. Paramount-Richards Theatres,* 198 F.2d 303, 305-08 (5th Cir.1952) (quoting extensively from Mr.

Justice Story, writing for the U.S. Supreme Court in *Parsons,* 28 U.S. at 438-39, 3 Pet. 433, and citing other cases acknowledging the authority of the jury as the proper tribunal to decide disputed questions of fact).[13]

In contrast, a Louisiana civil jury's fact-finding is subject to appellate review. La. Const. art. V, § 10(B) states:

> Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.

See Wright, supra, 198 F.2d at 306. While the jury's factual findings are entitled to deference, they can be set aside on appeal for abuse of discretion or when they are manifestly erroneous or clearly wrong. *Siverd v. Permanent General Ins. Co.*, 05-0973, p. 3 (La.2/22/06), 922 So.2d 497, 499 (citing *Arceneaux v. Domingue,* 365 So.2d 1330 (La.1978)). We contrast the right to a trial by jury under Louisiana law with the right to jury trial endowed by the Seventh Amendment under federal law to underscore that the Louisiana right is not so absolute in quality.

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[13] *See also Peoples Bank & Trust Co. of Mountain Home v. Globe International, Inc.*, 786 F.Supp. 791, 801 (W.D.Ark.1992); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107-08 (4th Cir.1991) (reiterating the principle that the Seventh Amendment provides for jury fact-finding, but addressing the issue of trial court procedures, e.g., directed verdict, demurrer, motion for new trial); *Sanders v. New York City Human Resources Administration,* 361 F.3d 749, 753 (2d Cir.2004) (and authorities cited therein); *Baltimore & Carolina Line, Inc. v. Redman,* 295 U.S. 654, 657, 55 S.Ct. 890, 79 L.Ed. 1636 (1935).

Of course, there was a trial by jury in this case. In fact, in *Scott I* we chided the trial judge for failing to accord the jury its proper place in the fact-finding process. *Scott I*, 04-2095 at p. 5, 949 So.2d at 1273. After the Phase II trial by jury, which yielded a special verdict assigning monetary damages for each year of the term of the award and for each component of the program, the trial judge issued a judgment based, according to the trial judge, not only on the jury's findings but also on his own findings of fact, equitable considerations, and applicable principles of equity and law. *Id.* at p. 4, 949 So.2d at 1272. In deference to La. C.C.P. arts. 1812 (special verdict form) and 1916 A ("[a]fter a trial by jury, the court shall prepare and sign a judgment in accordance with the verdict of the jury"), our court denounced that approach and recognized the solemn role of the jury as fact-finder-noting that there is no provision in Louisiana law for a judge to render written reasons for judgment in a jury trial and that when the jury returns a special verdict, the judge is bound to render a judgment in conformity therewith. *Id.* at p. 5, 949 So.2d at 1273. We further explained that there is no provision allowing a jury's verdict to be considered "advisory" and thereby allowing the trial judge to substitute his own findings of fact or render an interpretation of the jury's verdict. *Id.*

The tobacco companies on remand voluntarily limited themselves to an insistence on their demand for a new trial by jury. The tobacco companies had been litigating the inapplicability of the LPLA (La. R.S. 9:2800.51, *et seq.*) from the inception of the case and had a full opportunity to develop evidence at the jury trial as to the impact, if any, that the exclusion of persons addicted *after* its effective date in 1988

would influence the size of the class. They neither directly offered in the trial court nor proffered for our consideration evidence, pursuant to La. C.C.P. art. 1636, of their contentions concerning reduced class size or reduced utilization rates. Even after remand the tobacco companies did not submit evidence, as op-posed to their own hypothetical arguments, of the effect that the exclusion of persons addicted after 1988 would have on the class size. They merely relied upon our characterization without quantification in *Scott I* that a "large number" of the original 505,949 estimated program beneficiaries would no longer be eligible, coupled with their own hypothesis that program utilization rates by the remaining beneficiaries would likely fall, or perhaps would plummet due to the passage of time and the effects of nature. In other words, the tobacco companies have simply failed to show that there is any new material evidence that was not previously offered to the jury or proferred to the court which is not already in the record for our own constitutionally authorized review.

The tobacco companies do not attribute any due process violation to the trial judge or the appellate court in these proceedings; their sole contention arises from the denial of another jury. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process'" as articulated by the United States Supreme Court in *Caperton v. Massey*, --- U.S. ----, 129 S.Ct. 2252, 2259 and 2266, 173 L.Ed.2d 1208 (2009) (citing *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). The tobacco companies have had that fair trial in a fair tribunal, and accordingly we conclude that they have not established that the trial court's refusal to

empanel a new jury to consider the issues on remand violated their right to due process. However, we do not minimize the tobacco companies' expressed concern that the manner in which the trial court proceeded on remand to assess damages against them did not afford them the process which they were due.

Having concluded both that the tobacco companies' due process rights were not violated, we do not mean that our approbation of the proceedings in the trial court on remand is to be inferred. We expected and thought our instructions were clear enough in *Scott I* that the *trial judge* would engage in a careful review of the available evidence and exercise that fact-finding function of a trial judge to determine *whether* the amounts assessed by the jury for the funding of the four approved components were still appropriate. In our instructions we did not contemplate a new jury trial and we definitely did not mandate a *reduction* in the jury's findings. *Cf. Scott,* 04-2095 at p. 39, 949 So.2d at 1291 (Cannizzaro, J., concurring).

Judge Gorbaty, writing on this point in *Scott I* for a unanimous five-judge panel, wisely remanded the case for further review in the first instance to the trial level rather than rendering a decision, even though this court was capable and authorized by law to perform that function. In an ideal world we might prefer to insist upon the trial court's substantive compliance with our earlier directives. However, we now have before us considerations which impel us to

forego that preferred procedure and to render judgment on the record before us.[14]

This lawsuit was filed on May 24, 1996. Between 2000 and 2002, the trial court devised a trial plan to divide the trial into phases. Thereafter, a jury determined all issues of liability and all class-wide defenses in Phase I, which concluded on July 28, 2003. Phase II concluded with the jury's verdict on May 21, 2004, and the court's judgment on June 30, 2004. *Scott I* was decided by this court on February 7, 2007, and became final on June 9, 2008. Judge Ganucheau's amended judgment was rendered on July 21, 2008.

The ten-year remedy fashioned by the jury, and later approved by this court, has not yet begun. Not a single habitual smoker has yet benefitted from the program. The beneficiaries are aging. Dr. Naseta, whom the tobacco companies called as an expert witness at the jury trial, testified that every smoker should stop smoking and every habitual smoker would benefit from the cessation program. Further delay in rendering judgment will unnecessarily and, more importantly, unfairly impair the possibilities of aging smokers to cease their habits and to surely improve their own lives, not to mention the lives of their family members and co-workers.

IV

At the outset of our discussion and review of the award, we acknowledge and emphasize the unique nature of the relief afforded in this case. *See* the

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[14] By Order dated June 24, 2009, we granted the parties' joint motion to supplement the proceedings with the entire record from the appeal in *Scott I*.

description of this "complex class action" by Justice Kimball writing for the Supreme Court at a much earlier stage of these proceedings as "this unique and difficult case." *Scott v. American Tobacco Co., Inc.*, 02-2449, p. 4 (La.11/15/02), 830 So.2d 294, 297. The recipient of the award is not an individual or even group of individuals; it is a court-established and court-supervised smoking cessation pro-gram with a limited ten-year life. Nevertheless, the intended beneficiaries of the damage award are the multitude of individuals in Louisiana who began their smoking habit before September 1, 1988.

Our task and responsibility in reviewing this unique award is to ensure insofar as is practicable that the limited program is adequately funded to accomplish the jury's findings to the extent they were approved by this court in *Scott I, and at the same time* to guarantee that the tobacco companies are funding no more than they are liable for on account of their acts and omissions which injured the in-tended beneficiaries of the program. That is, the tobacco companies' obligation under the judgment cannot exceed the cost of repairing the harm caused by their fault. La. C.C. art. 2315.

Of course, absolute precision in any award is elusive. *See Sahuque Realty Company v. Employers Commercial Union Ins. Co. of America*, 327 So.2d 563, 566 (La.App. 4th Cir.1976) (emphasizing the discretion accorded the trier of fact in making awards when damages cannot be precisely determined or where there is considerable variance in estimated damages which renders calculation thereof difficult). But the *sole* objective under Louisiana civil law is to oblige the wrongdoers *only*

to repair the full extent of damage done by them, and not ever to punish the wrongdoers, no matter how shameful or outrageous their conduct. La. C.C. art. 2315; *K.E. Pittman v. Kaiser Aluminum and Chemical Corp.*, 559 So.2d 879, 883 (La.App. 4th Cir.1990) (stating that "Louisiana, however, has consistently rejected punitive damages in civil actions"); *Post v. Rodrigue*, 205 So.2d 67, 70 (La.App. 4th Cir.1967) (stating that "The settled law of Louisiana is that vindictive, punitive or exemplary damages are not allowed in civil cases unless specifically provided for; in the absence of such a specific provision only compensatory damages may be recovered").

The trial court in its amended judgment on remand simply incorporated the jury's determinations from the special interrogatories, which had been submitted to it in Phase II of the trial, on the four program components which were approved in *Scott I* and added the five-percent (5%) administrative fee also determined by the jury.[15] The total of the four approved components with the third-party administrative fee is $263,532,762.

Ordinarily, we would be guided by the principle set out in *Moore v. Kenilworth/Kailas Properties*: "[a]n appellate court may not overturn an award for damages unless it is so out of proportion to the injury that it shocks the conscience." *Moore*, 03-0738 at p. 9, 865 So.2d at 890. "The standard of review for damage awards requires a showing that the trier of

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[15] The 5% administrative fee assessed is not at issue. The tobacco companies agree that the percentage assessed is a reasonable cost.

fact abused the great discretion accorded in awarding damages. In effect, the award must be so high or so low in proportion to the injury that it 'shocks the conscience.'" *Harvey v. State, Dept. of Transp. and Dev.*, 00-1877, p. 11 (La.App. 4 Cir. 9/26/01), 799 So.2d 569, 577. The trier of fact has discretion in determining a special damages award. *Kaiser v. Hardin*, 06-2092, p. 11-12 (La.4/11/07), 953 So.2d 802, 810.

We, however, consider the failure of the trial court to re-assess the jury's findings in light of our decision in *Scott I* to be akin to a legal error which interdicts the fact-finding process. The Louisiana Supreme Court in *Evans v. Lungrin*, 97-0541, p. 6 (La.2/6/98), 708 So.2d 731, 735 declared:

It is well-settled that a court of appeal may not set aside a trial court's or jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989). However, where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, *if the record is otherwise complete*, the appellate court should make its own *de novo* review of the record and determine a preponderance of the evidence. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La.2/20/95); 650 So. 742, 747, *rev'd in part, on other grounds*, 96-3028 (La.7/1/97); 696 So. 569, *reh'g denied*, 96-3028 (La.9/19/97); 698 So.2d 1388. A legal error occurs when the trial court applies incorrect principles of law and such errors are prejudicial. *Lasha v. Olin Corp.*, 625 So.2d 1002, 1006 (La.1993). Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial

rights. *Lasha,* 625 So.2d at 1006. When such a prejudicial error skews the trial court's finding of a material issue of fact and causes it to pretermit other is-sues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential facts *de novo. Lasha,* 625 So.2d at 1006. (emphasis added)

In order to avoid a due process violation in the context of this class action proceeding, the tobacco companies cannot be condemned to pay more into the limited ten-year program than the amount necessary to fund such program if *every* beneficiary participated. "If all members of a class come forward and individually prove their damages, the defendant's liability would be the total of all its liabilities to individual members." 3 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 10:2, (4th ed.2002), p. 477. "The ultimate aggregate liability of the defendant can be no larger than its liability if all class members individually asserted their claims." *Id.* at § 10:24, p. 537. Conte and Newberg further explains that "aggregate proof of the defendant's monetary liability is no more unfair than class treatment of other elements of liability." *Id.* at § 10:2, p. 478.[16]

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[16] It should be noted that *Newberg on Class Actions* has been cited approvingly by the Louisiana Supreme Court as well as this court. *See, e.g., Ford v. Murphy Oil, U.S.A., Inc.,* 96-2913 (La.9/9/97), 703 So.2d 542, 544; *McCastle v. Rollins Environmental Services,* 456 So.2d 612, 620 (La.1984); *Doerr v. Mobil Oil Corp.,* 04-1789, p. 4 (La.App. 4 Cir. 6/14/06), 935 So.2d 231, 234-35; *Davis v. American Home Products Corp.,* 02-0942, p. 21 (La.App. 4 Cir. 3/26/03), 844 So.2d 242, 259.

Our constitutional and statutory authority allows us to make a *de novo* review of the entire record on both facts and law in order to render final judgment on the proper amount of the award to fund the ten-year program for components one through four for the remaining eligible beneficiaries. La. Const. art. V, § 10(B); La. C.C.P. art. 2164. *See also Grefer v. Alpha Technical*, 02-1237, p. 22 (La.App. 4 Cir. 8/8/07), 965 So.2d 511, 526.

From our review of the record, confirmed by the arguments of the parties in their briefs, no one disputes that the jury reasonably concluded *at the time of the trial* that the size of the eligible beneficiary class consisted of 505,949 smokers. With respect to the four approved components, and the estimates and calculations of Dr. David Burns, which were relied upon by the jury and the parties, the average cost of funding of the four-approved components would be $201 per eligible person per year and the median cost is $230 per person per year. The weighted average, based upon the smoker's preference for one or more methods, is $153 per smoker per year.[17] But in order to successfully quit smoking, a smoker often makes more than one attempt and sometimes several attempts; different smoking cessation methods are utilized by the same person. If a person utilized all available methods one time, the total cost per person would be $1,005. Finally, it is not disputed that the court-approved four-component smoking cessation program

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[17] According to Dr. Burns, more than half of the smokers utilizing the program will select the least expensive option of health systems intervention at a cost of $100 whereas only ten percent would select the intensive cessation program.

formulated by Dr. Burns is for a period of ten years, which program will be operated by a third-party administrator.

The evidence is clear that the beneficiary class consists of some people who began smoking even before they were thirteen years old, more than half began by the time they were twenty, and all but about 15% were smoking before they were twenty-four years old. This evidence must be understood in light of the application of one of the *Bourgeois*[18] factors-increased risk of latent disease. Dr. Burns explained that ten years of pack-a-day smoking appears to increase disease risk, but it takes 20-pack years to show an increased disease risk; and it takes 25 to 30 years for those who smoked fewer than 10 cigarettes a day. Dr. W. Brooks Emory testified that it takes 25-30-packs per year for an increased risk of

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[18] The Louisiana Supreme Court in *Bourgeois v. A.P. Green Industries, Inc.*, 97-3188, pp. 9-11 (La.7/8/98), 716 So.2d 355, 360-61, lists seven criteria on which a court can base an award of the reasonable cost of medical monitoring as an item of damage under La. C.C. art. 2315:(1) significant exposure to a proven hazardous substance; (2) as a proximate result of this exposure, plaintiff suffers a significantly in-creased risk of contracting a serious latent disease; (3) plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease; (4) a monitoring procedure exists that makes the early detection of the disease possible; (5) the monitoring procedure has been prescribed by a qualified physician and is reasonably necessary ac-cording to contemporary scientific principles; (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) there is some demonstrated clinical value in the early detection and diagnosis of the disease.

lung cancer or chronic obstructive pulmonary disease. Depending on how much one smoked, a person would have to have started 10-20 or more years earlier in order to have the risk of latent disease. Thus, for the most at risk group of smokers who would not have been ineligible on account of the effective date of the LPLA, the initial date of smoking would be 1978 or earlier. It is unlikely, although still possible, that someone born as late as 1974 could still be an eligible beneficiary.

The evidence is also clear that the incidence of smoking has been in continual decline since the mid-1960s, and that lower percentages of individuals in the years since then have begun smoking than in the years before then. In other words, the vast majority of the original 505,949 eligible beneficiaries were clearly addicted before September 1, 1988, the effective date of the LPLA. And of those, most were forty-five years or older at the time of the trial. When cross-examined, Dr. Burns agreed that about half of Louisiana's population is younger than this group. Because of the diminishing incidence of tobacco use over the last five decades, and setting aside on that account that persons over fifty years old would be overrepresented in the 505,949 eligible beneficiaries, there is no doubt that at least 250,000 Louisiana residents were eligible for the court-approved smoking-cessation program approved by this court in *Scott I*. But we must also consider the effect of the passage of time upon the determination of the amount appropriate to fund the program. The evidence is clear that, even in the absence of a smoking-cessation program (or perhaps because of its absence), the number of class members would decline over the years. Six years after the trial the

estimated eligible beneficiaries, including those not yet excluded by operation of the LPLA, has diminished to 420,339. Of this group, there can be no doubt that *at least* 210,000 are members of the class approved by *Scott I*.

Utilizing Dr. Burns' "Budget for a Comprehensive State-wide Cessation Program for Louisiana," we calculate *mutatis mutandis* the amount due by the tobacco companies to fund the court-approved smoking-cessation program in an amount which does not exceed the reasonable cost if all eligible beneficiaries chose to participate, applying the annual cost per eligible class member of $153, the median cost of service for cessation methods:

Year No.	No. of daily smokers[19]	No. of class members	Cessation Service
1	210,000	210,000	$ 32,130,000
2	198,870	194,229	$ 29,717,037
3	191,810	179,565	$ 27,473,445
4	184,847	165,738	$ 25,357,914
5	177,971	152,810	$ 23,379,930
6	171,226	140,891	$ 21,556,323
7	164,600	129,817	$ 19,862,001
8	58,115	119,523	$ 18,287,019
9	151,727	109,937	$ 16,820,361
10	145,294	101,010	$ 15,454,530
		Total costs	$230,038,560

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[19] The reduction in this column is based upon Dr. Burns' 40% utilization rate, which the tobacco companies found objectionable. How-ever, in this context, the highest utilization rate is favorable to the tobacco companies as it more quickly reduces the estimated number of class members in future years.

Accordingly, we determine that the amount necessary to fund the *Scott I*-approved smoking-cessation pro-gram for the remaining eligible beneficiaries to be $230,038,560 plus the stipulated five (5%) administrative fee of $11,501,928 for a total award of $241,540,488, and amend the trial court's judgment accordingly. The tobacco companies shall deposit this sum with accrued judicial interest in the registry of the district court on the date of the finality of this judgment. *See* La. C.C.P. arts. 2166-2167.

V

We recognize that the trial court, as it proceeds to implement the program, needs "[f]lexibility rather than rigidity" in making "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

Because the amount ordered to be paid is not for the use of particular individuals but in order to fund a court-supervised program, which is in the nature of a trust fund, its oversight is a fiduciary obligation of the court. See La. R.S. 39:1211. Accordingly, within ninety days of its de-posit into the registry of the Civil District Court for the Parish of Orleans, and after deduction for the first year's operating expenses of the program, the balance of the funds are to be transferred by the court to a federally insured depository institution organized under the laws of this state or of the United States, which depository shall be required to furnish security for the deposit in the same manner and amount as security required by La. R.S. 39:1221-1226.

The funds transferred shall be deposited in an interest-bearing account.[20] *See* La. R.S. 39:1231 B. This procedure will maximize the interest earned on the funds, which will inure either to the benefit of the smoking-cessation program or, if there are surplus funds at the conclusion of the program, to the tobacco companies.

We also, by this judgment, specially reserve unto the tobacco companies at the termination of the ten-year smoking cessation program the right to assert its claims to any unspent or surplus funds. *See, e.g.*, La. R.S. 13:4232.

VI

La. R.S. 13:4203, which provides that "[l]egal interest shall attach from date of judicial demand, on all judgments, sounding in damages, 'ex delicto,' which may be rendered by any of the courts." The purpose of awarding pre-judgment interest was to compensate a plaintiff for his or her loss of the use of money to which he or she is entitled, and which the defendants had during the progress of the litigation. *Trentecosta v. Beck*, 95-0096, p. 2 (La.App. 4 Cir. 2/25/98), 714 So.2d 721, 726. We reversed the award of pre-judgment interest, noting that the creation of a smoking cessation program in which no money was awarded to individual plaintiffs did not fit the definition of "damages" pursuant to *Bourgeois, supra*, and pre-judgment interest would not "serve the

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[20] We are aware of the provisions of La. R.S. 13:1305 D(1) which provides for the de-posit of funds into the Registry of the Court, which deposit will bear interest. However, the Registry only provides the "ultimate recipient" with 50% of the interest earned.

intended purpose of La. R.S. 13:4203." *Scott I*, 04-2095 at p. 38, 949 So.2d at 1290.

The trial court on remand awarded post-judgment interest from the date of its first judgment, which was substantially reduced in *Scott I*. Because of that substantial reduction and because *Scott I* did not make any award, it is inappropriate to award interest from the date of the trial court's first judgment. *See also, e.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835-836, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990). Therefore, the proper date from which post-judgment interest should be calculated is July 21, 2008, the date of the amended judgment. We, therefore, amend the trial court judgment to award judicial interest from the date of this judgment.

DECREE

Accordingly, Phillip [sic] Morris USA Inc., The Tobacco Institute, Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, and Brown & Williamson Tobacco Company (now known as Brown & Williamson Holdings, Inc., individually and as successor by merger to The American Tobacco Company), *in solido*, shall deposit into the registry of Civil District Court for the Parish of Orleans the full sum of $241,540,488, with judicial interest from July 21, 2008, until paid.

AMENDED AND, AS AMENDED, AFFIRMED.

APPENDIX B

Court of Appeal of Louisiana,
Fourth Circuit

No. 2004-CA-2095.

Gloria SCOTT and Deania M. Jackson, on Behalf of Themselves and All Other Persons Similarly Situated

v.

The AMERICAN TOBACCO COMPANY, INC.; American Brands, Inc.; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Brown & Williamson Tobacco Corporation; Batus, Inc.; Batus Holdings, Inc.; Philip Morris, Inc.; Philip Morris Companies, Inc.; et al.

Feb. 7, 2007.
Rehearing Denied March 2, 2007.

Joseph M. Bruno, Davis S. Scalia, Bruno & Bruno, *Kenneth M. Carter, Kenneth M. Carter,* PLC, New Orleans, *Jack M. Bailey, Jr.,* Shreveport, *Daniel*

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(Court composed of Judge *MICHAEL E. KIRBY*, Judge *TERRI F. LOVE*, Judge *DAVID S. GORBATY*, Judge *LEON A. CANNIZZARO, JR.*, Judge *ROLAND L. BELSOME*).

GORBATY, Judge.

A class was certified as one for the establishment of a court-supervised medical monitoring and/or smoking cessation program fund. Following two phases of trial, a judgment was rendered whereby defendants[1], cigarette manufacturers and a public relations firm, were ordered to fund a smoking cessation program for class members who desired to quit smoking. Defendants appeal that judgment. For the following reasons, we affirm in part, amend in part, reverse in part, and remand.

PROCEDURAL HISTORY:

This lawsuit was originally filed on May 24, 1996, on behalf of Gloria Scott and Deania Jackson. In 1997 a class was certified to include all Louisiana

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[1] Defendants-appellants are: Brown & Williamson Tobacco Corporation, for itself and for the entity named as The American Tobacco Company (to which Brown & Williamson Tobacco Corporation is the successor by merger) (incorrectly referred to in the Judgment as Brown & Williamson Tobacco Company); Lorillard Tobacco Company; Philip Morris USA, Inc. (incorrectly referred to in the Judgment as Philip Morris, Inc.); Tobacco Institute, Inc.

residents who smoked on or before May 24, 1996, and who desired to participate in a monitoring and/or cessation program. Between 2000 and 2002, the trial court created a trial plan, which defendants claim was repeatedly altered. After many writ applications and remands addressing how the ultimate trial should proceed, the Supreme Court ordered that the trial court proceed with Phase I of the trial, assuming that the common issues of fault and causation could be tried during this phase along with any applicable class-wide affirmative defenses. The Louisiana Supreme Court further ordered that the trial court formulate a plan to try individualized issues thereafter.

Following Phase I of the trial, the jury rendered a verdict whereby it rejected plaintiffs' product defect claim. Generalized findings in plaintiffs' favor were made with regard to the claims for fraud and breach of an assumed duty. However, no specific findings as to any individual plaintiff were made. The jury rejected plaintiffs' medical monitoring claim, but again made generalized findings in favor of a smoking cessation program.

Subsequent to Phase I, the trial court issued Trial Order No. 10. The order included the trial court's assessment of what transpired during Phase I, and directives on what would transpire during Phase II and thereafter. The trial court determined that all common issues of liability (fault and causation, including the *Bourgeois* factors[2]), and all applicable class-wide defenses and affirmative defenses had been tried by the jury in Phase I. The jury had determined the need for a court

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[2] Discussed *infra* Assignment of Error No. 7.

administered smoking cessation program. The trial court further found that, based on the evidence adduced and the law, principles of comparative fault and assumption of the risk did not apply to the case. Further, there were no remaining liability issues to be tried on a class-wide basis. The trial court surmised that the plaintiffs' claims were for a single, common, unitary, equitable, court-supervised fund by the class as a whole. Therefore, the only issue of reliance was on a class-wide basis, which the Phase I jury determined existed. Individual reliance was not an issue for Phase II, but would be reserved for Phase IV when individual, monetary damages were determined. The court further found that failure to mitigate was not a viable affirmative defense because participation in a cessation program was mitigation in and of itself. Lastly, the court overruled the defendants' exception of prescription finding that the doctrines of *contra non valentem* and continuing tort applied.

At the end of Phase II, the jury returned a special verdict form accepting all of plaintiffs' demands, except for limiting the smoking cessation program to a 10 year period (plaintiffs had requested a 25 year program).

Almost six weeks after the jury returned its verdict, the trial court issued a judgment and a separate document entitled "Findings of Fact and Reasons for Judgment." The judgment ordered that the jury's award of $591,342,476.55 plus pre-judgment interest be paid into the court's registry. The judgment did not include the jury's Phase I finding that defendants' product was not defective or that plaintiffs were not entitled to medical monitoring. The trial court explained that it was issuing its own judgment, with detailed reasons,

because it considered the jury's verdict to be merely advisory.

This appeal followed.

DISCUSSION:

ASSIGNMENT OF ERROR NO. 8:

We address this assignment of error first as it affects our use of the judgments, special verdicts, findings of fact, evidence and rulings considered to address each other assignment of error.

Defendants aver that the trial court erred by displacing the jury as finder of fact by refusing to include in the final judgment the jury's rejection of plaintiffs' claim that defendants' product was defective in normal use, and the jury's rejection of plaintiffs' demand for medical monitoring. Further, the trial court erred in making its own factual finding that defendants had assumed duties to protect others when they published the *Frank Statement* and the *Cigarette Advertising Code of 1964*, rather than submitting that factual finding to the jury. Lastly, defendants aver that the trial court erred when it rendered the jury's findings "advisory" and issued its own "Findings of Fact and Reasons for Judgment."

Following Phase I of the trial, the trial court issued Trial Order No. 10, which stated in part: "The Court therefore determines that a Phase II trial is necessary and that trial shall be conducted in accordance with this Order and tried by the Phase I jury." Weeks after issuing Trial Order No. 10, the trial court issued a *per curiam* wherein it stated that the Phase II proceedings were equitable or injunctive in nature, thus obviating the need for a jury. However, out of an abundance of caution, the trial

court would allow the jury to adjudicate Phase II. Subsequent to the Phase II trial, the trial court issued a judgment acknowledging that the matter had been tried before a jury, but stated that the judgment was based on an adoption of the jury's findings for both Phase I and Phase II, its own findings of fact, equitable considerations, and applicable principles of equity and law.

Louisiana Code of Civil Procedure Art. 1812 D provides in the case of a special verdict, the trial court shall "enter judgment in conformity with the jury's answers to these special questions and according to applicable law.". La. Code of Civ. Proc. art. 1916 provides that "[w]hen a case has been tried by a jury, the following rules shall apply as to a judgment rendered on the verdict: ... (2) When the jury returns a special verdict, the judge must sign a judgment in accordance therewith ...." There is no provision in Louisiana law for a judge to render written reasons for judgment in a jury trial. Further, there is no provision for a jury's verdict to be considered "advisory," thereby allowing the trial court to interpret the jury's verdict or substitute its own findings of fact. This Court will not, therefore, consider the trial court's findings of fact or reasons for judgment. Further, we will consider the judgment rendered insofar as it tracks the jury's special verdicts.

Accordingly, we amend the judgment to include the jury's finding that defendants' product was not defective in design prior to or after September 1, 1988, and that medical monitoring is not reasonably necessary.

ASSIGNMENTS OF ERROR NOS. 5 and 6:

We will next address these assignments of error, since they are dispositive of major issues in this case. Defendants argue that the jury's rejection of plaintiffs' claims under the Louisiana Products Liability Act (LPLA), La. R.S. 9:2800.51, *et seq.*, precludes class-wide liability because the LPLA provides the exclusive remedy for persons claiming injury due to product defects. Therefore, any class member who began smoking after the effective date of the LPLA, September 1, 1988 ("post-1988 smokers"), or whose injury (addiction) accrued after that date, should be precluded from pursuing a claim.

Plaintiffs counter that because the cigarette industry intentionally exposed them to harmful toxins, with the intention of causing addiction to defendants' products, their claims should be excluded from coverage under the LPLA. Plaintiffs propose that even assuming, *arguendo*, that a cigarette is not defective because it did exactly what it was engineered and manufactured to do, their claims should not be preempted because "the manner in which their [the defendants'] cigarettes were engineered and marketed resulted in both addiction and an increased risk of harm, which was largely unknown and unknowable to the Plaintiff Class and yet substantially certain by Defendants to occur." Plaintiffs suggest that because their claim is unique, it should be excluded from coverage under the LPLA. Also, plaintiffs argue that because the defendant cigarette manufacturers conspired with the Tobacco Institute, the Tobacco Industry Research Committee and the Council for Tobacco Institute to suppress research, to conceal information and to confuse the issue of smoking and health, the cigarette industry

should be considered non-manufacturers, and thereby not shielded by the LPLA.

Lastly, plaintiffs argue that the jury's finding that defendants engaged in fraudulent activity in conspiracy with the Tobacco Institute also removes plaintiffs' claims from the realm of the LPLA. They argue that under Louisiana law "fraud vitiates all things."

The LPLA provides the exclusive theory of liability available to persons claiming a product defect after September 1, 1988 ("post-1988 smokers"). The statute recognizes four theories of liability. A manufacturer may be held liable if its product is unreasonably dangerous when a claimant's damage arises from a reasonably anticipated use of the product. La. R.S. 9:2800.54. A product is unreasonably dangerous if and only if the product is unreasonably dangerous: (1) in construction or composition; (2) in design; (3) because an adequate warning has not been provided; or, (4) the product does not conform to an express warranty of the manufacturer. La. R.S. 9:2800.54B(1-4).

The plaintiffs' petition indicates that they sought damages based on a design defect only. In Phase I of the trial, the jury found that the cigarettes being sold by defendants both before and after the effective date of the LPLA were in normal use and were not defective in design. A strict interpretation of the LPLA, therefore, provides that the only theory of liability available to post-1988 smokers, or plaintiffs who began smoking before September 1, 1988 ("pre-1988 smokers") whose injury accrued after September 1, 1988, was rejected by the jury. For all class members subject to the LPLA, the jury's finding

was case-dispositive. Other liability theories were unavailable as a matter of law.

Fraud claims cannot be used to circumvent the LPLA. *See generally Kemp v. Armstrong World Indus.*, 02-1293, pp. 7-8 (La.App. 1 Cir. 5/28/03), 855 So.2d 774, 779; *Arabie v. R.J. Reynolds Tobacco Co.*, 96-0978, pp. 2-4 (La.App. 5 Cir. 6/30/97), 698 So.2d 423, 424-25; *Brown v. R.J. Reynolds TobaccoCo.*, 52 F.3d 524, 526 (5th Cir. 1995); *Jefferson v. Lead Indus. Ass'n*, 930 F.Supp. 241, 245 (E.D. La. 1996). Nor is there an LPLA exception for intentional breach of an "assumed duty." *See Stahl v. Novartis Pharmaceuticals Corp.*, 283 F.3d 254, 261-62 (5th Cir. 2002).

Further, the issue of whether or not the LPLA can be applied retroactively is irrelevant here. It is beyond dispute that the LPLA applies prospectively to all post-1988 smokers, as well as all pre-1988 smokers whose claims accrued on or after the effective date of the Act. La. R.S. 9:2800.52; *Kemp v. Armstrong World Indus.*, 02-1293 (La.App. 1 Cir. 5/28/03), 855 So.2d 774.

Finally, defendants argue that the trial court erred in including a jury interrogatory concerning the relationship between defendants and the Tobacco Institute, the Tobacco Industry Research Committee, and the Council for Tobacco Research (referred to herein collectively as "TI"). TI was an industry trade organization, unlike other defendants, which are cigarette manufacturers. Without a request from plaintiffs, the trial court included a jury interrogatory asking if TI was the alter ego of the defendant manufacturers. Defendants propose that the purpose of this interrogatory was to place all of the defendants outside the scope of the LPLA. In

other words, since TI was not a manufacturer under the LPLA, if the jury found that TI was the manufacturers' alter ego, then the manufacturers were also subject to non-LPLA claims as well. According to defendants, the problem with this reasoning is that plaintiffs offered no proof whatsoever to establish that TI was the alter ego of the defendant manufacturers.

The alter ego doctrine evolved after the creation of limited liability entities such as corporations came into vogue. The purpose of the doctrine is to allow plaintiffs to "pierce the corporate veil" of a corporation in order to hold individual shareholders liable for wrongdoing. It usually involves situations where fraud or deceit has been practiced by a shareholder acting through the corporation. *Riggins v. Dixie Shoring Co.*, 590 So.2d 1164, 1168 (La. 1991). Another basis for piercing the corporate veil is when the shareholders disregard the requisite corporate formalities to the extent that the shareholders are no longer distinct from the corporate entity. *Id.*; *Gordon v. Baton Rouge Stores Co.*, 168 La. 248, 121 So.2d 759 (1929).

There are several non-inclusive factors a court may use to determine whether to apply the alter ego doctrine: 1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings. *Riggins, supra; Manning v. United Medical Corp. of New Orleans*, 04-0035, p. 9 (La.App. 4 Cir. 4/20/05), 902 So.2d 406, 412-13. We are cognizant that there could be other factors in determining that the corporate veil should be

pierced, however, it is also clear that the other factors would also deal with the day-to-day operation of the corporation. None of those factors are present in this case. The record does not contain any evidence whatsoever to reach the conclusion that the TI is the alter ego of the defendant manufacturers.

Indeed, that conclusion can only be reached by skewed logic. If TI were the manufacturers' alter ego, TI would also qualify as a manufacturer, and thus be covered under the LPLA. There was no allegation, proof or finding that TI controlled the manufacturers. Additionally, the jury interrogatories concerning fraud and conspiracy only named the defendant manufacturers, not the TI. Thus, there was no jury finding that the TI conspired with the defendant manufacturers to commit fraud.

Nor is the award justified under a theory of equitable relief. Plaintiffs aver that where, as here, a unique situation exists that "challenges our traditional legislation and customs," the court should proceed according to equity. But equity cannot alter the elements of a claim, or create a new claim that belongs solely to the class as opposed to its members. Under Article 4 of the Louisiana Civil Code, resorts to equity are barred unless "no rule" governs the case that "can be derived from legislation or custom." This case is governed by the LPLA and Article 2315 of the Louisiana Civil Code. These laws constitute "express law" and thus preclude plaintiffs' attempt to create new forms of liability in "equity." Plaintiffs suggest that *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188 (La. 7/8/98), pp. 7-8, 716 So.2d 355, 360, endorses their attempt, but the Supreme Court made it clear that even a monitoring claim requires the establishment of liability "under traditional tort

theories of recovery." *Bourgeois*, p. 11, 716 So.2d at 362.

Moreover, plaintiffs contradict themselves. In their effort to rationalize the award of prejudgment interest (which is clearly unavailable in equity), plaintiffs argue that the "liability" here is not equitable, only the remedy is. Thus, in plaintiffs' view as well, all traditional elements of liability still must be established.

In sum, equitable relief in this case has no foundation in Louisiana law, violates due process, and uproots the very concept of adjudication. Therefore, the only available remedies to plaintiffs are express law. As discussed earlier, the LPLA is the exclusive remedy available to post-1988 smokers and pre-1988 smokers, whose injury accrued after that date (collectively, the "excluded plaintiffs"). Since the jury rejected the plaintiffs' claims under the LPLA, this group is not entitled to any award, even smoking cessation treatment. The only remaining group of plaintiffs that is eligible to receive cessation assistance is the pre-1988 smokers, whose claim accrued before 1988 (collectively, the "remaining plaintiffs"). We therefore affirm the jury's award as it pertains to the pre-1988 smokers and reverse the jury's verdict as it pertains to the excluded plaintiffs, and specifically find that the members of the excluded class are not eligible to receive any type of award.

ASSIGNMENT OF ERROR No. 1:

Defendants argue that the trial court violated Louisiana law and due process by holding defendants liable to all class members, where (a) there was no proof or jury finding that all class members were addicted (the alleged classwide injury); (b) plaintiffs'

experts conceded that many class members were not addicted; (c) both plaintiffs' experts and the court acknowledged that addiction was an individualized issue and could not be determined on a class-wide basis; and (d) the court failed to elicit the necessary findings of injury in its jury instructions and interrogatories.

Phase I of the trial in this matter adjudicated all common issues of liability (fault and causation). After six months of trial, at which numerous fact and expert witnesses testified, and during which thousands of internal tobacco company documents were admitted and read to the jury, the jury found that the defendants, individually and conspiring with each other, knowingly and deliberately conspired to commit, and did commit fraud that spanned five decades, directly causing injury to the class of Louisiana smokers. The jury determined that the defendants knowingly and deliberately addicted the population of Louisiana smokers to a product known by them to be both addictive and extremely toxic. In sum, the jury found that the actions of these defendants increased the risk of harm to the entire class of Louisiana smokers and determined the remedy to be cessation assistance.

Defendants claim that the plaintiffs are required to prove that each individual class member is addicted to cigarettes, as a prerequisite to participate in a program. However, the jury determined that the intent and effect of the defendants' conduct was, and is, to encourage addiction, which results in a significantly increased risk of developing serious illness or disease. No class member or other person who is not dependent on cigarettes would consider availing himself of a cessation program. Therefore, as a matter of due process for *res judicata* purposes,

defendants do not need to know precisely who is in the class, nor is it necessary that each and every class member be determined to be clinically addicted to nicotine. The only people who will seek to participate in this program will be those who desire to participate: those who are addicted or dependent upon nicotine. Neither Civil Code art. 4, Civil Code art. 2315, amended Civil Code art. 2315, nor any other authority requires that in order to participate in the cessation program, a plaintiff must prove that he is addicted to something.

Furthermore, the central common question concerning the addictive nature of cigarettes as designed and manufactured by the defendants was answered in the affirmative during Phase I of trial. All of the experts agreed that smokers are at a significantly increased risk of harm, and virtually every witness-including defendants' own experts-testified that cessation treatment should be offered to all smokers who desire to avail themselves of such assistance. The Phase II testimony (specifically that of Dr. David Burns, plaintiff's expert) also confirmed that cessation is recommended for all smokers, whether dependent, addicted, or habituated. In light of these facts, and since smoking cessation is desirable regardless of addiction, we find that addiction is not an issue that must be determined on an individual basis. We find that addiction and injury were properly proven at trial by the remaining plaintiffs. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2:

Defendants next assert that the trial court violated Louisiana law and due process by holding defendants liable to all class members, where (a) there was no proof or jury finding that established

the reliance element of plaintiffs' fraud claim; (b) there was no proof or jury finding that established the necessary causation and other elements of an "assumed duty" claim; and (c) the court misstated the necessary elements of plaintiffs' fraud and "assumed duty" claims in its jury instructions and interrogatories.

Proof of fraud requires causation in the form of reliance. The jury specifically found that there was detrimental reliance on the distorted knowledge concerning smoking and health by a class of Louisiana citizens, that there was detrimental reliance on the distorted knowledge concerning the properties of nicotine, and that such reliance was reasonable. The certified claim is one for a single, court-supervised fund by the class as a whole. Therefore, the only question of reliance pertains to the reliance by the class as a whole. If and when individual class members assert individualized claims for money damages, individual reliance may be at issue at that time. However, individual reliance is not at issue in the instant case.

Defendants urge that *Banks v. New York Life Ins. Co.*, 98-0551 (La. 7/2/99), 737 So.2d 1275, is controlling. We find that the instant case is distinguishable from *Banks*. *Banks* involved fraud by affirmative misrepresentation; non-uniform representations made by thousands of insurance agents; and fraud accomplished by direct, rather than indirect, channels of communication. The case at bar involves fraud of suppression, concealment, and omission designed to distort the entire body of public knowledge through indirect communications.

The Phase I evidence revealed a five decade long public relations effort to create the impression in the

public that there was a legitimate controversy about the health effects of smoking, even though defendants knew that such an impression was false. The trial record shows that defendants sought to create doubt about the connection between smoking and disease so that smokers would be able to justify beginning or continuing to smoke.

In *Falise v. American Tobacco Company*, 94 F.Supp.2d 316 (E.D.N.Y. 2000), the court stated:

Where ... the fraudulent scheme is targeted broadly at a large portion of the American public, the requisite showing of reliance is less demanding. Such sophisticated, broad-based fraudulent schemes by their very nature are likely to distort the entire body of public knowledge rather than to individually mislead millions of people ...

[T]o require reliance on specific misrepresentations where indirect challenges on communication were integral to the success of the scheme would produce the perverse result of having the most massive and sinister fraudulent schemes be the ones that must escape ... liability.

Id. at 320.

We agree. Where a defendants' lengthy course of prohibited conduct affects a large number of consumers, like the class of Louisiana smokers, and the defendants use indirect communications designed to distort the entire body of public knowledge, the showing of reliance that must be made to prove a causal connection between smoking and the class-wide reliance on communications from the defendants need not include direct evidence of reliance by individual consumers of defendants' cigarettes. Rather, the causal connection may be established by direct or other circumstantial

evidence that a court determines is relevant and probative as to the relationship between the class claim and the prohibited conduct. We find that causation and reliance were adequately proven in this matter, and hold that the jury's finding of detrimental reliance was not error. As such, we deem defendants' second assignment of error to be without merit.

ASSIGNMENT OF ERROR NO. 3:

Defendants argue that the trial court prevented them from contesting plaintiffs' claims with specific proof relating to the class representatives' knowledge, conduct, and other circumstances, in violation of Louisiana law and due process. Specifically, defendants were not allowed to question the class representatives as to why they began smoking; why they smoked certain brands or types of cigarettes; whether they relied on the alleged misrepresentations; whether they were addicted; why they stopped smoking; and when they had notice of their claims for purposes of prescription. Defendants complain that they were barred from presenting to the jury pre-trial admissions by the two class representatives that they had smoked for reasons unrelated to any alleged misconduct; that they had received warnings about the risks of smoking from doctors, family, and the media; that they were fully aware of the federally-mandated health warnings; and, that they were aware of their alleged injury many years prior to the filing of this lawsuit.

After reviewing the jury's findings, we find the trial court's denial of cross-examination to the defendants on the issue of why plaintiffs began smoking was harmless error. The jury specifically

found that plaintiffs' had not proven that defendants' products were a substantial factor in causing the class **to begin smoking**. Rather, the jury found that defendants' products were a substantial cause of plaintiffs **continued smoking,** based on the jury's additional finding that defendants' products were addictive. These findings were sufficiently supported by expert testimony and are not manifestly erroneous.

Regarding the denial of cross-examination as to whether they relied on defendants' misrepresentations, whether they were addicted, or why they stopped smoking[3], we also find that it was harmless error to not allow cross-examination of the class representatives. Plaintiffs urge that the record is replete with evidence that defendants withheld volumes of knowledge from the public concerning the harmful, if not deadly, chemicals that were contained in defendants' products. Our review of the record confirms the presence of extensive record evidence that the defendants consciously withheld information from the public-information vitally important to an informed decision to smoke or not. The jury heard this evidence and made a factual finding that defendants' intentionally withheld the information to the detriment of plaintiffs. Therefore, the issue of reliance is irrelevant because the information upon which plaintiffs could rely to make an informed decision was severely lacking due to defendants' misrepresentations.

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[3] According to defendants, both class representatives made pre-trial admissions that they had quit smoking prior to trial.

ASSIGNMENT OF ERROR NO. 4:

Defendants also argue that the trial court erred in not allowing them to present any affirmative defenses including prescription, comparative fault, and failure to mitigate.

Defendants argue that the trial court improperly nullified the prescription defense by not allowing them to cross-examine the class representatives on the issue. Defendants aver that a finding that *contra non valentem* and continuing tort defeated the defense of prescription on a class-wide basis was error.

The courts created the doctrine of *contra non valentem* as an extension of the general rules of prescription. The Louisiana Supreme Court and this Court have determined the factual situations to which the doctrine applies so as to prevent the running of liberative prescription: "1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; 2) where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting; 3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of the cause of action; or 4) where the cause of action is neither known nor reasonably knowable by the plaintiff even though the plaintiff's ignorance is not induced by the defendants." *Renfroe v. State, ex rel Dep't of Transp. and Dev.*, 01-1646, p. 9 (La. 2/26/02), 809 So.2d 947, 953; *In re: Medical Review Panel of Thomas*, 05-0879, 05-0880, p. 3 (La.App. 4 Cir. 5/31/06), 934 So.2d 188, 189-90.

Defendants admit that two of the above situations are arguably applicable to the case at

hand. The first situation is where the debtor himself has done some act effectually to prevent the creditor from availing himself of the cause of action, and, the second is where the cause of action is neither known nor reasonably knowable by the plaintiff even though the plaintiff's ignorance is not induced by the defendants. However, defendants argue that there is nothing in the record to establish that they "effectually" prevented the plaintiffs from suing earlier, or that plaintiffs lacked sufficient knowledge to sue earlier.

Plaintiffs urge that the defendants did prevent them from timely filing suit because they were not aware of certain information withheld from the general public through defendants' fraud, conspiracy and intentional concealment.

We do not find plaintiffs' argument persuasive. Although the jury found and the record supports that defendants engaged in fraudulent behavior in concealing the extent of the addictive nature of their products, the record also contains evidence of the warnings placed on cigarette packages to alert plaintiffs to the possible consequences of continued smoking. Thus, we do not find that the doctrine of *contra non valentem* is applicable to the facts of this case.

The second basis upon which the trial court relied for denying defendants' exception of prescription is that the defendants' actions constituted a continuing tort, a jurisprudentially recognized doctrine that is an exception to the general rules of prescription. The trial court based its ruling on the jury's determination that the defendants intentionally promoted dependence upon nicotine from at least December 1953 through at

least May 24, 1996, and that the defendants engaged in a fraudulent conspiracy to suppress information and distort the truth from at least January 1954, through May 24, 1996.

The continuing tort doctrine only applies when continuous conduct causes continuing damages. *Risin v. D.N.C. Investments, L.L.C.*, 05-0415, p. 4 (La.App. 4 Cir. 12/7/05), 921 So.2d 133, 136, *citing Bustamento v. Tucker*, 607 So.2d 532, 542 (La. 1992). Where the cause of injury is a continuous one giving rise to successive damages, prescription does not begin to run until the conduct causing the damage is abated. *Risin, supra, citing South Central Bell Telephone Co. v. Texaco, Inc.*, 418 So.2d 531, 533 (La. 1982). The *Bustamento* court found that the doctrine applied in that case because the acts or conduct were continuous, were perpetrated by the same actor, were of the same nature, and the conduct became tortious by virtue of its continuous, cumulative, and synergistic nature. *Bustamento*, 607 So.2d at 542.

Defendants argue that once the class representatives learned of their alleged addiction, prescription began to run as to their claims. Plaintiffs again argue that the jury's finding that defendants engaged in a fraudulent conspiracy to suppress information and distort the truth through at least the date suit was filed supports a finding that the doctrine of continuing tort is applicable.

We agree with the plaintiffs. In *Wilson v. Hartzman*, 373 So.2d 204 (La.App. 4 Cir. 1979), this Court explained:

[T]he continuing and repeated wrongful acts are to be regarded as a single wrong which gives rise to and is cognizable in a single action, rather than a series of successive actions. Therefore, the date for

commencing the accrual of prescription of an action based on the single wrong is the date of the last wrongful exposure, and the single action may be filed within the prescription period reckoning from the cessation of the continuing wrongful acts.

Id. at 207 (citations omitted). The Court also recognized the distinction between the discovery rule and the continuing tort doctrine:... while prescription as a general rule begins to run from the date of commission of the tort, in those cases in which the damages are not immediately apparent, it has often been held that prescription begins to run from the time a reasonable person under similar circumstances would have become aware of both the tort and the damages. See Stone, Louisiana Civil Law Treatise Tort Doctrine § 120 (1977).

Another exception to commencement of prescription on the date of the tort is the situation in which the tortious conduct that is the operating cause of the damages is a continuing act, giving rise to successive damages from day to day. In such a case prescription does not commence to run until the continuing cause of the damages is abated.

Id. at 206.

Moreover, the Louisiana Fifth Circuit explained in *Coulon v. Witco Corp.*, 03-208 (La.App. 5 Cir. 5/28/03), 848 So.2d 135, 138, that the continuous tort doctrine does not encompass the plaintiff's knowledge in order to decide when prescription will begin to run.

We agree with the trial court that defendants' tortious conduct was continuous. The jury's findings that defendants' intentionally withheld information from the general public as to the addictive nature of their products at least through the date this suit was

filed constitutes a continuing tort. Thus, the trial court properly denied defendants' exception of prescription.

Defendants also argue that the trial court erred in improperly nullifying their defense of comparative fault because such a defense is inherently individualized. The trial court stated in the November 4, 2003 *per curiam* that comparative fault does not apply to this case because the record confirms the plaintiffs' assertions that the defendants intentionally addicted the class "with substantial certainty that the class ... would be seriously harmed and that thousands of Louisiana citizens would be subjected to an increased risk of contracting serious latent diseases that lead to death." The court relied on La. Civ. Code art. 2323 C in support of its position. Article 2323 C provides, in part: "... if a person suffers injury, death or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced."[4] The trial court further reasoned that comparative fault should not apply to the class because the jury found that the plaintiffs used defendants' products precisely as intended.

Defendants argue that the trial court ignored recent jurisprudence interpreting La. Civ. Code art. 2323. In *Landry v. Bellanger*, 02-1443 (La. 5/20/03), 851 So.2d 943, the Supreme Court examined in detail the legislative intent of the addition of Section C to Article 2323. The Court deduced that the

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4 Plaintiffs point out that although Article 2323 C was not enacted until 1996, the enactment merely codified existing jurisprudence.

"article clearly requires that the fault of every person responsible for a plaintiff's injuries be compared regardless of the legal theory of liability asserted against each person." *Landry*, 841 So.2d at 952, *citing Dumas v. State*, 02-0563 (La. 10/15/02), 828 So.2d 530. The Court further noted "the fact that the plaintiff may have been aware of the risk created by the defendant's conduct should not operate as a total bar to recovery. Instead, comparative fault principles should apply, and the victim's 'awareness of the danger' is among the factors to be considered in assessing the percentages of fault." *Id.* at 02-1443, p. 13,851 So.2d 953, *citing Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1134 (La. 1988).

Although the facts of the *Landry* case are vastly different (the litigation evolved from damages sustained in a bar room fight), and the Court was primarily addressing the application of the "aggressor doctrine," it is clear that the same principles apply to the facts of this case. The interpretive rule enunciated in *Landry* is:

It is appropriate to consider the party's respective fault when a matter involves intentional tortfeasors. In prohibiting the reduction of a negligent plaintiff's damages, Article 2323(C) reflects a legislative determination that on the continuum of moral culpability, the act of an intentional actor should not benefit from a reduction in the damages inflicted on a less culpable negligent actor. In the face of the silence of La. C.C. art. 2323(C) regarding how to address the comparative fault of two intentional actors, we can extrapolate from paragraphs A and B of La. C.C. art. 2323 that the fault of the intentional actors can be compared.... Therefore, ... Section C applies only when plaintiff's

contributory fault consists of negligence and does not apply where the plaintiff's fault is intentional.

Id. at 954.

The trial court reasoned that because of defendants' fraudulent and conspiratorial behavior, i.e., denying the addictive nature of its products, plaintiffs could not have consented to becoming addicted, and were thus without fault. The record, however, supports that the jury found defendants' were not responsible for plaintiffs' decision to begin smoking, a decision that can be interpreted as an intentional act. However, the jury also found that defendants were responsible for plaintiffs continuing to smoke because of the addictive nature of defendants' products. Thus, plaintiffs' continued smoking can not be interpreted as intentional behavior. Thus, the *Landry* ruling addressing the comparative fault of two intentional tortfeasors is not applicable to this case. Rather, the previous rule enunciated in *Veazey v. Elmwood Plantation Associates, Ltd.*, 93-2818 (La. 11/30/94), 650 So.2d 712, 719, and confirmed by the *Landry* court is applicable, i.e., Section C of La. Civ. Code art. 2323 is applicable only when a plaintiff's fault is negligent compared to a defendant's intentional fault. Accordingly, we do not find the trial court erred in not allowing defendants' to present the defense of comparative fault.

Lastly, defendants urge that the trial court improperly nullified their failure to mitigate defense. They argue that the trial court's pronouncement that "participation in a cessation program is mitigation in and of itself," ignores the definition of mitigation: steps a plaintiff could have taken *before* filing suit that would have avoided or reduced the costs he or

she now seeks. Defendants contend that plaintiffs could have mitigated their damages by quitting without cessation assistance before filing suit.

This argument ignores the jury's finding that defendants caused plaintiffs' injury, and the finding that defendants' fraudulent and conspiratorial denial that their products were addictive and/or contained significant levels of substances proven hazardous to human health caused plaintiffs' inability to quit smoking, made it more difficult for plaintiffs to quit smoking, or made it likely that a plaintiff would begin smoking again after quitting.

We agree with the trial court that only those plaintiffs who desire to quit smoking will apply for participation in the cessation program. Thus, whatever steps a plaintiff did or did not take to stop smoking prior to filing suit is irrelevant to the facts of this case.

ASSIGNMENT OF ERROR NO. 7:

Defendants claim that the trial court violated Louisiana law and due process by awarding smoking cessation treatment to all class members where a) plaintiffs' experts conceded that such treatment was medically unnecessary for large segments of the class, and b) the court confused smoking cessation with medical monitoring under factors enunciated in *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188 (La. 7/8/98), 716 So.2d 355, and applied to smoking cessation a garbled set of *Bourgeois* factors in its jury instructions and interrogatories.

Bourgeois, supra, involved plaintiffs, current and past employees of Avondale Shipyards, who allegedly were exposed to asbestos-containing products. Plaintiffs claimed that because of the exposure, they were in need of regular medical examinations to

facilitate the early detection and treatment of possible latent diseases. Plaintiffs sought the establishment of a judicially administered fund to cover the cost of periodic monitoring.

The Supreme Court recognized that the reasonable cost of medical monitoring is a compensable item of damage under La. Civ. Code art. 2315. *Id.* at 97-3188, p. 11, 716 Sc.2d at 360. However, to recover such costs a plaintiff must satisfy certain criteria, with proof being offered via competent expert testimony: 1) significant exposure to a proven hazardous substance; 2) as a proximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; 3) plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease; 4) a monitoring procedure exists that makes the early detection of the disease possible; 5) the monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles; 6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and, 7) there is some demonstrated clinical value in the early detection and diagnosis of the disease. *Id.* at 97-3188, pp. 10-11, 716 So.2d at 360-61.

Defendants argue that the *Bourgeois* court recognized medical monitoring, not a cessation program, as a compensable item of damage. The jury rejected medical monitoring as reasonably necessary. Thus, it was error for the trial court to apply the *Bourgeois* factors to a claim for a cessation program.

Plaintiffs counter that the same policy considerations that caused the Supreme Court to craft a limited, court-supervised remedy in the medical monitoring context are also present with respect to a classwide claim for the establishment of a court-supervised fund for a cessation program.

After an examination of the criteria established by the Supreme Court in *Bourgeois*, we agree with plaintiffs.

Factor One: Significant exposure to a proven hazardous substance.

The record fully supports the fact that plaintiffs suffered significant exposure to hazardous substances. We recognize that unlike the Avondale workers, plaintiffs voluntarily began smoking and thus subjected themselves to the toxins, and that the jury did not find defendants liable for causing plaintiffs to begin smoking. However, the jury did find that defendants were liable for plaintiffs' continued smoking, inability to quit or difficulty in quitting, or relapses-all factors linked to the addictive nature of nicotine.

Factor Two: As a proximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

Again, the record supports the fact that smokers have an increased risk of developing serious, life-threatening diseases. The record also supports the fact that quitting smoking, even after years of doing so, can increase a smoker's chance of not contracting serious latent diseases.

Factor Three: Plaintiff's risk of contracting a serious latent disease is greater than (a) the

risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease.

The Supreme Court explained that this factor serves to ensure that the plaintiffs have a need for medical monitoring as a result of exposure. Further, it serves to ensure that exposures suffered by the public at large, which increase the entire populations' risk of disease, do not form the basis of the claims. *Bourgeois*, 97-3188, pp. 9-10, 716 So.2d at 361. The record supports the fact that smokers' risk of contracting certain diseases, particularly those manifesting in the lungs, is greater than the chance of a member of the general public contracting the same disease. The need to quit smoking is fully supported by the record evidence.

Factor Four: A monitoring procedure exists that makes the early detection of the disease possible.

The jury found that plaintiffs did not prove that a medical monitoring procedure was reasonably necessary. It also found that a medical monitoring procedure was no different than normal detection procedures in the absence of exposure to cigarettes. We can only surmise that the jury reasoned that routine annual check-ups could provide the same benefits, and that the defendants should not be made to pay for such examinations.

However, the jury did find that there was clinical value in providing cessation programs and that it was proven such programs existed and were reasonably necessary. As noted above, the record supports the fact that quitting smoking, even after

years of doing so, can increase a smoker's chance of not contracting serious latent diseases.

Factor Five: The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles.

See Factor Four.

Factor Six: The prescribed monitoring regime is different from that normally recommended in the absence of exposure.

As noted under Factor Four, the jury did not find it medically necessary to award a medical monitoring program, perhaps because it believed monitoring could be achieved in the course of regular physical examinations. However, clearly there is no need for the establishment of a cessation program in the absence of exposure to nicotine and other toxins contained in cigarettes. The jury found that plaintiffs became addicted to cigarettes because of the toxins contained in defendants' products, and that defendants should therefore pay the cost of helping them to quit.

Factor Seven: There is some demonstrated clinical value in the early detection and diagnosis of the disease.

The Court also explained in *Bourgeois* that to fully establish medical monitoring expenses as a cognizable damage under La. Civ. Code art. 2315, plaintiffs must show that there is some medical benefit to be gained through early detection. *Id.* at p. 11, 716 So.2d at 361. Although a cessation program will not serve to detect a latent disease at its earliest stage, as stated above, the record contains evidence

that quitting smoking can lessen a person's chances of contracting a life-threatening disease.

Accordingly, we find no error in the trial court's adaptation of the *Bourgeois* factors for purpose of formulating jury instructions and interrogatories.

ASSIGNMENT OF ERROR NO. 9:

Defendants argue that the trial and other post-certification developments demonstrated that the class must be decertified. According to the defendants, the trial demonstrated that common issues failed to predominate over individualized issues. Further, defendants argue that the trial confirmed that trying this case as a class action was neither "manageable" nor "superior" to other methods of adjudication. Finally, defendants claim that the class must be decertified because the improper class definition and inadequate class notice preclude any legally binding judgment.

Plaintiffs initially sought certification of a broad class action, including claims for personal injuries, general damages, and special damages to be paid directly to the class members. The trial court certified a much more limited class action that sought the establishment of a court-supervised medical monitoring and/or smoking cessation fund. This Court affirmed the class certification, and the Louisiana Supreme Court denied writs. *Scott v. American Tobacco Co.*, 98-0452 (La.App. 4 Cir. 11/4/98), 725 So.2d 10, *writ denied*, 98-3016 (La. 2/26/99), 731 So.2d 189. After trial, the jury determined that the plaintiffs were entitled to a cessation program only. As discussed above, this Court has limited the class even further by excluding a large group of plaintiffs. Only the remaining plaintiffs are eligible to seek cessation assistance.

We find that this class definition, as amended by this Court, is proper.

The principal fallacy in the defendants' position is the failure to recognize the important distinction between a common unitary claim by a class as a whole for the establishment of a single unitary fund or program, and the aggregated actions of several different, distinct claims of individuals for individualized damage awards. Pursuant to the jury's verdict, no specific judgment or allocation for cessation benefits to any individual class member was made. The only claim that any of the remaining plaintiffs have is the right to apply for participation in a cessation program from the established fund.

Phase II of the trial answered the questions of how many class members were addicted, dependent, or had otherwise suffered an injury; how many of those class members would benefit from one or more smoking cessation methods; and how many would likely avail themselves of those methods. This Court has pared down that group further. The administration of the court-supervised and court-directed trust fund will then determine eligibility to participate.

None of the cases cited by defendants (including *Ford v. Murphy Oil U.S.A. Inc.*, 96-2913, 96-2917, 96-2929 (La. 9/9/97), 703 So.2d 542, *Banks*, and *Spitzfaden v. Dow Corning Corp.*, 98-1612 (La.App. 4 Cir. 12/4/02), 833 So.2d 512) hold that there must be an individualized series of jury trials to determine whether each class member is eligible to participate in a court-supervised cessation program. To the contrary, courts that have addressed the issues in other jurisdictions have held that such "individualized" eligibility determinations should be

made administratively, not by a jury. *See Petito v. A.H. Robins Co.*, 750 So.2d 103, 107 (Fl. Dist. Ct. App. 1999); *Day v. NLO*, 851 F.Supp. 869, 885-87 (S.D. Oh. 1994).

This Court has already distinguished *Ford*, a proposed class action involving the claims of residents living in the vicinity of four petrochemical plants for "varying individual damages." *Scott v. American Tobacco Co.*, 98-0452, pp. 4-7 (La.App. 4 Cir. 11/4/98), 725 So.2d 10, 12-14. *Banks* implicates individual causation issues because it addresses proposed certification of individual damage claims and is thus inapplicable. Nor does *Spitzfaden* apply here. *Spitzfaden* was certified for personal injury damages, and the trial plan did not call for any causation finding in Phase I. Here, Phase I included the common issues of fault and causation.

In re Tobacco II Cases, D046435 (Cal. 4th App. Dist., Div. 1, 9/5/06), 47 Cal. Rptr.3d 917, recently addressed the certification of a class action for mass tobacco litigation. However, this case too is distinguishable from the instant matter. The plaintiffs in *Tobacco II*, unlike the plaintiffs in *Scott*, sought individual awards of money damages-each class member in *Tobacco II* was making an individual claim for restitution of the cost of his or her cigarette purchases. In contrast, plaintiffs here are seeking a single court-supervised fund for the payment of class-wide cessation costs.

Defendants also aver that individual notice to potential plaintiffs should have been issued, instead of publication notice only. However, defendants cite no authority for the proposition that individual notice must be given. In light of the large number of potential plaintiffs, individual notice would be

unduly burdensome. Publication notice is adequate and sufficient in this matter.

In the instant case, the individualized claims of class members for damages have been reserved, and will have to be litigated in the future. They are not before us today. It was appropriate for the *Scott* class to establish class-wide causation and "reliance" with respect to an element of damages (a single court-supervised cessation program) common to the class as a whole. This common issue predominates; thus, a class action is the superior vehicle for adjudicating these claims. This assignment of error lacks merit.

ASSIGNMENT OF ERROR No. 10:

Defendants next aver that the trial court erroneously entered a judgment based on claims that were barred in whole or in part by federal preemption and the First Amendment. Through rulings on evidence, argument, and jury instructions, the court allowed plaintiffs to assert liability and seek relief based on allegations that (a) defendants failed to disclose health-related information beyond the federally-required warning labels carried by all cigarette packages and advertising; (b) defendants' advertising "neutralized" the federally-required warnings, associated smoking with attractive images and activities, and potentially appealed to youth; (c) defendants' use of terms such as "low tar" and "lights" in advertising and on packages was false and misleading; or (d) defendants engaged in commercial speech, governmental lobbying, and advocacy before governmental agencies. Further, the judgment is based on a jury award that incorporated plaintiffs' request for the funding of court-supervised public

relations and advertising, which effectively constitutes government-compelled speech.

Article VI of the Constitution provides that it and the laws of the United States "shall be the supreme Law of the Land; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Thus, since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Accordingly, " '[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1189, 55 L.E.2d 443 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)).

Congress's intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, see *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983), or if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference

that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230, 67 S.Ct., at 1152).

In *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), the United States Supreme Court outlined the scope of preemption under the Federal Cigarette Labeling and Advertising Act where, as here, injured and/or defrauded smokers bring a lawsuit for damages against a cigarette manufacturer. Under *Cipollone*, the following claims are not preempted: claims based on pre-1969 conduct; claims for the breach of a voluntarily assumed or self-imposed duty or standard, such as the breach of an express warranty made about the product; intentional fraud and misrepresentation through the concealment of material facts through channels of communication other than traditional advertising and promotion; intentional fraud and misrepresentation by affirmative false statements of material fact in advertising and promotion; and/or claims arising from a conspiracy among the defendants to conceal or misrepresent material facts concerning the health risks of smoking. *Cipollone*, 505 U.S. at 528-30, 112 S.Ct. at 2623-2625.

In the case at bar, the jury found, among other things, that defendants intentionally engaged in actions designed to distort the body of public knowledge concerning smoking and health, and that such fraud contributed to the need for cessation of smoking programs. The jury also found that defendants were engaged in a conspiracy to distort the body of public knowledge concerning smoking and the properties of nicotine. As such, under

Cipollone, these claims are not barred by federal preemption.

The advertisements called for in the jury verdict are not requirements imposed upon defendants by the state, but rather, the independent activities of a court-supervised fund. Defendants' contention that they violate the First Amendment has no merit.

ASSIGNMENT OF ERROR NO. 11:

In their final assignment of error, defendants argue that the damages award is riddled with mistakes.

First, defendants assert that the jury awarded over $312 million for "program components" that were not legally recoverable.

In Phase II, plaintiffs presented their proposed 25-year cessation program in a spreadsheet that listed twelve components and cost estimates for each, totaling $1.182 billion. The jury accepted all of plaintiffs' components and cost estimates, except that it reduced the overall duration of the program from twenty-five years to ten years, resulting in an award of more than $591 million.

Columns one through four (labeled respectively "Reimbursement of medications," "Telephone quitlines," "Health systems interventions," and "Intensive cessation programs") presented cost estimates for traditional cessation aids such as nicotine gum, patches, and telephone counseling. The remaining eight of the twelve cost components, accounting for more than $312 million, constitute demands for the creation of a statewide ministry of health, including "infrastructure," "centers of excellence," a multi-tentacled bureaucracy, and

marketing campaigns. Defendants aver that these components are not legally recoverable.

Column Five: Developing cessation capacity. Dr. David Burns, plaintiff's expert, testified that column five provided funds for programs in unspecified localities at "a local hospital, a local health clinic, maybe even a local pharmacy," and to "start the healthcare systems, building tracking systems, finding ways to put smoking cessation into a comprehensive healthcare context." He allocated $6.5 million annually for the first three years, diminishing thereafter to $2.5 million for the eighth and final year, but his numbers lacked support in any other programs or studies. The award incorporated all of Dr. Burns's suggested funding for the first five years, for a total amount of $29.5 million.

Column Six: Community cessation programs. Dr. Burns testified that column six included grants to "communities, that is, churches and other groups that would be interested in providing" cessation services. Such grants might be appropriate benefactions by a legislature or philanthropy, but they cannot constitute an appropriate award by a court. Dr. Burns allocated $1 million annually for this component. There was no basis or support for this amount. The jury awarded a total of $10 million in this category.

Column Seven: Marketing and education. Column seven included funds for advertising and promotion to "recruit" participants and "to increase demand." The $13,056,000 annual allocation had no basis in other cessation programs or studies. Confirming that this amount was sheer conjecture, Dr. Burns suggested that someone else would have to

figure out how to spend it. The total amount awarded by the jury was approximately $130 million.

Column Eight: Evaluation of program effectiveness. Dr. Burns suggested an allocation of $6,212,000 annually for "research projects" and "research centers" (in addition to the "local centers of excellence" proposed in column nine), but with no budget as to "who is going to get this money." A total of $62,120,000 was awarded for this category.

Column Nine: Local centers of cessation excellence. Dr. Burns here proposed eight "centers of excellence" to be erected at unknown locations around the state. Plaintiffs variously described these facilities as developing "standards," training "people in the field," "upgrad[ing] skills," "enhanc[ing] the quality of services," and treating smokers who are "schizophrenic" or "depressed." Dr. Burns allocated $4 million annually but again admitted that he had no specific budget for any aspect of this category. The jury awarded $40 million for this component.

Column Ten: Development of program standards. Dr. Burns testified that column ten provided for a committee to develop standards, but he knew nothing about the prospective size of the committee, its membership, or its actual costs. He allocated $500,000 annually for this section, and there was a total of $5 million awarded by the jury.

Column Eleven: Monitoring and auditing. Dr. Burns testified that column eleven would ensure that "funds are spent for optimal service and only for those people who are entitled to them." However, we find that his allocation was nothing more than an estimate with no factual foundation. He suggested amounts beginning with $700,233 the first year, and

diminishing thereafter. A total of $5,019,671 was awarded in this category.

Column Twelve: Training and technical assistance. Column twelve suggests an allocation of $12 million annually "to train doctors and their office staff." There was no factual basis for this award; Dr. Burns did not know how many doctors and staff were already present in Louisiana, or how many would need training. A total award of $30 million total was given for this column.

We find that the remedy in this case was limited to the medically necessary costs of cessation treatment. Plaintiffs had no basis for seeking anything beyond such costs. The amounts awarded in columns five through twelve are speculative, unsubstantiated, and unrelated to the actual treatment of nicotine addiction. The cost estimates suggested by Dr. Burns were not based upon utilization rates, class size, or any other facts. As such, we deem these awards not legally recoverable, and reverse the jury's verdict as it pertains to columns five through twelve.

Defendants next contend that the award was barred by release and *res judicata*. Plaintiffs sought, and obtained, a comprehensive, statewide cessation program, effectively open to any Louisiana smoker who might want to participate. According to defendants, plaintiffs' request for such public and open-ended relief duplicated claims already asserted and resolved by the State of Louisiana in its prior suit against the same defendants on behalf of all Louisiana smokers. The resolution of the State's claims barred plaintiffs' claims here under the doctrines of release and *res judicata*, defendants reason.

The Master Settlement Agreement ("MSA") included a list of forty lawsuits throughout the United States that were identified as "released claims." This list did not include the instant case, which had been certified as a class action nineteen months earlier. Further, the Releasing Parties under the MSA do not include private citizens, such as Ms. Scott and Ms. Jackson, nor purport to settle claims of the State as *parens patriae* for private redress. This argument has no merit.

Defendants also argue that the court erroneously expanded the class definition and thus the potential cost of any cessation program. The class definition included Louisiana residents who "desire to participate in a [cessation or monitoring] program." The class notice stated: "If you do not want to participate in a program designed to assist you in cessation of smoking ... you are not a member of this class." At the close of evidence, the court gave a jury instruction that expanded class membership to include smokers who had no pre-existing "desire to participate" but who might form such a desire at any future time for "the duration of the program," which the jury later determined to be ten years. This instruction increased the number of potential participants tenfold, according to defendants.

We disagree. The instruction did not expand the class definition. Rather, the only people who will be affected by the verdict are those people who, at any point in time, might wish to avail themselves of the benefits of such a program. The class members were provided with notice and given the opportunity to opt out of the class. For those class members who did not opt out, the practical effect of the verdict is the same: Anyone who at any time might have desired, or may yet desire, to participate, is bound by the

judgment in this case.' This ruling was not erroneous.

Next, defendants claim that the court committed further legal error by failing to instruct the jury to reduce any award to present value, as most of the costs of a cessation program would be incurred in the future.

Defendants had a full opportunity to have their own economics expert testify about present value, but did not do so. Defendants' expert did not offer a present value calculation. We find no error in this ruling.

Defendants further argue that the trial court erred by awarding prejudgment interest.

Louisiana Revised Statute 13:4203 provides "[l]egal interest shall attach from date of judicial demand, on all judgments, sounding in damages, 'ex delicto', which may be rendered by any of the courts." The term *ex delicto* is Latin for "from a wrong" or "from a transgression," and is used in law to indicate the consequences of a tort.

Awarding legal interest on a judgment was designed to compensate a plaintiff for his loss of the use of money to which he is entitled, the use of which the defendant had while the litigation progressed. *Trentacosta v. Beck*, 95-0096 (La.App. 4 Cir. 2/25/98), 714 So.2d 721.

Defendants argue that the award in this case is unique in that it does not award money damages to plaintiffs. Plaintiffs counter that it does not matter how the award is crafted because the cause of action arises in tort pursuant to La. Civ. Code art. 2315.

We agree with defendants that an award of the creation of a smoking cessation program does not

qualify for pre-judgment interest as intended by La. R.S. 13:4203. While it can be argued that there was the potential for a monetary judgment to each plaintiff, in actuality, no money is being awarded individually. Indeed, following a hearing on plaintiffs' motion to exclude evidence of comparative fault, the trial court issued reasons for judgment in which it explained that plaintiffs' claim for the establishment of a medical monitoring and/or cessation program is not an action for "damages" as defined in *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188 (La. 7/8/98), 716 So.2d 355. *See Scott v. American Tobacco Co., Inc.*, 2002-2449, 2002-2452 (La. 11/15/02), 830 So.2d 294, 296. Thus, it cannot be argued that plaintiffs were deprived of the use of money while this litigation was pending. The jury award fully funded a smoking cessation program in which all qualified plaintiffs may participate. Prejudgment interest in this context would not serve the intended purpose of La. R.S. 13:4203.

Finally, defendants assert that the trial court erred by failing to provide for an allocation of fault among defendants.

In Phase I of the trial, the jury found that there was a conspiracy among all of the named defendants. As to the class of plaintiffs, the defendants are solidarily liable pursuant to Louisiana Civil Code art. 2324(A). As such, further allocation of fault was unnecessary. The trial court did not err.

CONCLUSION:

Accordingly, for the foregoing reasons, the trial court's judgment is affirmed in part, amended in part and reversed in part. We remand this matter for further proceedings.

AFFIRMED IN PART; AMENDED IN PART; REVERSED IN PART; REMANDED

CANNIZZARO, J., concurs in the result with reasons.

BELSOME, J., dissents in part and assigns reasons. CANNIZZARO, J., concurring in the result with reasons.

I write separately to clarify my understanding of the results reached by the majority. The appellants were ordered by the trial court judge to fund a smoking cessation program for certain members of the plaintiff class who desire to participate in such a program for the purpose of overcoming nicotine addictions that were acquired by using tobacco products manufactured or promoted by the appellants. The plaintiff class included all Louisiana residents who used tobacco products on or before May 24, 1996. The class pursued their claims based on a number of theories, including fraud, the breach of an assumed duty, and products liability.

The majority finds that the class members who began using or became addicted to tobacco products after September 1, 1988, the effective date of the Louisiana Products Liability Act, La. R.S. 9:2800.51 *et. seq.* (the "Act"), should be treated differently from those who began smoking and became addicted to tobacco products before the effective date of the Act. The majority finds that the class members who began smoking and became addicted prior to the effective date of the Act (the "Pre-1988 Smokers") proved that the appellants owed certain duties to the pre-1988 Smokers and that those duties were breached. Thus, the majority finds that the Pre-1988

Smokers were entitled to damages. I agree with this result.

The majority also finds that the class members who began using or became addicted to tobacco products after the effective date of the Act (the "Post-1988 Smokers") are not entitled to any recovery. The majority bases this result on the exclusivity provision of the Act, which states that "[t]his Chapter [La. R.S. 9:2800.51 *et seq.*] establishes the exclusive theories of liability for manufacturers for damage caused by their products," and on the jury finding that the tobacco products manufactured and promoted by the appellants were not defective products. Because the Act provided the exclusive remedy for the Post-1988 Smokers, I agree with this result reached by the majority.

I also concur with the majority's resolution of the issue of damages. I agree that damages should be awarded for the reimbursement of medications, for the funding of telephone quit lines, and for the providing of health system interventions and intensive cessation programs but not for the remaining items of damages awarded by the trial court. I further agree with the majority that the award is not the type of award to which prejudgment interest applies. Additionally, I agree with the majority's affirmation of the trial court's determination that ten years should be the time period during which the damages should be made available to the Pre-1988 Smokers.

Based on my understanding of the majority opinion, I concur in the following results:

1. The Post-1988 Smokers are not entitled to any award.

2. The Pre-1988 Smokers are entitled to an award of the following items to the extent that they may assist them in overcoming their addictions to tobacco products: reimbursement for medications, health interventions, telephone counseling, and traditional smoking cessation aids, such as nicotine patches and nicotine chewing gum.

3. The Pre-1988 Smokers are not entitled to an award for any of the remaining items for which damages were claimed.

4. The smoking cessation program, which will consist of the items of damages listed in paragraph 2, will last for ten years.

5. The case will be remanded to the trial court to reduce the amount of the damages to cover the Pre-1988 Smokers only, because the members of the plaintiffs class who are entitled to recover include only those smokers and do not include the Post-1988 Smokers.

6. The trial court will render a revised judgment consistent with the majority opinion.

BELSOME, J., dissenting in part and assigning reasons.

I respectfully join in with the majority's findings regarding the damages awarded to the pre-1988 smokers and the conclusion that the award is not the type to which pre-judgment interest applies. Additionally, I concur in the affirmation of the trial court's decision that 10 years should be the duration of the cessation program. I depart from the majority's opinion on one issue; the post-1988 smokers should remain in the class.

While the majority correctly finds the LPLA provides the exclusive theory of liability against a manufacturer after September 1, 1988, I disagree with the ultimate conclusion. At issue is whether a product designed for human consumption is not defective within its design even though it requires the creation of a cessation program for its users. Why would a product free from defect necessitate a cessation program for its users? That declaration by the jury combined with the responses given in other jury interrogatories, namely that the defendant engaged in fraud and designed a product that was intended to cause its users to become addicted, clearly suggests that such a product is defective per se. It is inconceivable for a product intended for human ingestion to not be defective in design, even though it significantly increases the risk of contracting diseases such as lung cancer, bladder cancer, chronic obstructive pulmonary disease and cardiovascular disease. That conclusion simply defies all logic.

How can the court reconcile those findings with the conclusion that the product was not defective in design? Arguably, because the cigarette manufacturers accomplished their objective in designing a product that would cause the public to become addicted to harmful substances, the manufacturers are able to escape liability under the LPLA. That reasoning produces an illogical and unjust result. The post-1988 smokers are being exposed to the same substances that the jury found to be hazardous to human health and are facing an increased risk of disease, yet, they will be excluded from receiving help to overcome their addiction because the jury, apparently using a very literal

interpretation of "defective in design", found the product did what it was intended to do.

In the confines of the LPLA "unreasonably dangerous" is synonymous with "defective". Thus, the jury's determination that the product was not defective in design is inconsistent with its other findings, as well as the evidence in the record and therefore, manifestly erroneous. Accordingly, I would reverse and render on that issue.

APPENDIX C

The Supreme Court of the State of Louisiana

GLORIA SCOTT AND DEANIA M. JACKSON, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED.

VS. NO. 2010-C-1361

AMERICAN TOBACCO COMPANY, INC.; AMERICAN BRANDS, INC.; R.J. REYNOLDS TOBACCO COMPANY; RJR NABISCO, INC.; BROWN & WILLIAMSON TOBACCO CORPORATION; BATUS, INC.; BATUS HOLDINGS, INC.; PHILIP MORRIS, INC.; PHILIP MORRIS COMPANIES, INC.; ET AL.

IN RE: Philip Morris USA Inc.; Tobacco Institute Inc.; - Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. I, Nos. 96-8461; to the Court of Appeal, Fourth Circuit, No. 2009-CA-0461

September 3, 2010

Denied.

JLW

BJJ

JPV

JTK

GGG

MRC

APPENDIX D

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 96-8461 *AD HOC* DIVISION DOCKET NO.

GLORIA SCOTT and DEANIA M JACKSON,

on behalf of themselves and all others similarly situated

versus

THE AMERICAN TOBACCO COMPANY, INC., et al.

AMENDED JUDGMENT

THIS MATTER came before the Court, tried before a Jury, in two phases, from June 18, 2001 thru May 21, 2004, pursuant to former Louisiana Code of Civil Procedure Article 593.1, and in accordance with CMO#2, Trial Order No 5, the November 15, 2002 Order and Opinion of the Louisiana Supreme Court,[1] and Trial Order No. 10.[2]

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[1] *Scott v. American Tobacco*, No. 2002-2449 (La. 11/15/02), 830 So.2d 294.

CONSIDERING the evidence presented, the Phase I findings of the Jury set forth in the Special Verdict of July 28, 2003 which the Court adopts, the Phase II findings of the Jury set forth in the Special Verdict of May 21, 2004 which the Court adopts equitable considerations and applicable principles of equity and law, and;

FURTHER CONSIDERING the dictates of the Court of Appeal, Fourth Circuit in *Scott v. American Tobacco Co.*, (La. App. 4 Cir. 2/7/07) 949 So.2d 1266, which is now final; and pursuant to which this amended judgment is issued;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants, Philip Morris, Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Brown & Williamson Tobacco Company, individually and as successor to the interests of the American Tobacco Company, and the Tobacco Institute, are liable, jointly, severally and *in solido*, to the certified Plaintiff Class, for funding the cost of a court-supervised smoking cessation program including the establishment, implementation and administration of the program set out below;

IT IS FURTHER ORDERED THAT the court-supervised program will consist of a comprehensive smoking-cessation program, which will include the following components: (i) reimbursement of smoking-cessation-related medication; (ii) telephone quitlines; (iii) health system interventions and (iv) intensive cessation programs;

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[2] Defendants objected to Trial Order No. 10, and sought writs, which were denied. 2003-1872 (La. App. 4 Cir. 12/5/03), *writ denied*, No. 2004-0009 (La. 2/13/04), 867 So.2d 691.

IT IS FURTHER ORDERED THAT the court-supervised comprehensive cessation program will, subject to the supervision of the Court, be administered by a third-party administrator appointed by the Court which is hereby authorized to perform whatever acts are necessary to implement the cessation program described herein;

DEFENDANTS ARE HEREBY ORDERED to deposit two hundred sixty three million, five hundred thirty two thousand, seven hundred and sixty two dollars ($263,532,762.00) together with judicial interest from June 30, 2004 until paid into the Registry of the Civil District Court in trust for the Plaintiff Class for the funding of the court supervised and comprehensive cessation program composed of the following components with the amounts for each component set out below:

	Component	Amount
1	Reimbursement of smoking-cessation related medication	$101,554,050.00
2	Telephone quit lines	$33,367,760.00
3	Health system intervention	$76,165,537.00
4	Intensive cessation programs	$39,86,233.00
	Administration 5%	$12,549,179.00

for the funding of the court supervised comprehensive cessation program;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Verdict of the jury, the defendants' product was not defective in design prior to or after September 1, 1988 and that medical monitoring is not reasonably necessary;

THE COURT will retain jurisdiction over this case with respect to the establishment, implementation, supervision and administration of the court-supervised fund, court-supervised cessation program and to resolve all other outstanding issues, including, but not limited to, the assessment of court costs and/or attorneys fees and for any subsequent phase of this trial deemed necessary in accordance with Louisiana Code of Civil Procedure Article 593,1.

READ, RENDERED, AND SIGNED this 21st day of July, 2008, at New Orleans, Louisiana.

/s/
RICHARD J. GANUCHEAU
JUDGE, *AD HOC*

APPENDIX E

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 96-8461 AD-HOC DIVISION "1"

GLORIA SCOTT and DEANIA M. JACKSON, on behalf of themselves and all other others similarly situated

vs.

THE AMERICAN TOBACCO COMPANY, INC., ET AL.

JUDGMENT

Defendants' Motion to Enter Judgment for Defendant or, In the Alternative To Enter Case Management and Trial Order, and Plaintiffs' Motion for Rule to Show Cause and/or to Execute Judgment of the Fourth Circuit came for hearing on June 30, 2008.

After considering the pleadings, the evidence, the argument of counsel and the law; IT IS ORDER [sic] that the defendants' motions and the plaintiff class' motions and request for a show cause order be, and they are hereby denied.

JUDGMENT, READ, RENDERED AND SIGNED this the 21st day of July 2008.

/s/
JUDGE RICHARD GANUCHEAU
JUDGE AD HOC

APPENDIX F

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 96-8461 *AD HOC* DIVISION DOCKET NO.

GLORIA SCOTT and DEANIA M. JACKSON,

on behalf of themselves and all others similarly situated

versus

THE AMERICAN TOBACCO COMPANY, INC., et al.

REASONS FOR JUDMENTS

This matter came before the Court on Motion of the Plaintiff Class for Rule to Show Cause and/or to Execute Judgment of the Fourth Circuit and on Motion of the Defendants to Enter Judgment for Defendants or in the Alternative to Enter Case Management and Trial Orders.

The Court has issued a Judgment denying both motions.

The Court has issued an amended judgment in accord with the dictates of the Court of Appeal, which judgment orders defendants to pay into the

Registry of Civil District Court the total amount awarded by the jury for components one through four of the jury verdict, i.e. $263,532,762.00 for the entire ten year program.

The Court is mindful of the reduction in class size by the court of appeal decision, however the Court is also cognizant that the court of appeal could have ordered a recalculation of class size, and/or quantum, and/or a new trial on those issues, but no such orders are contained in that court's opinion in this matter dated February 7, 2007.

The amended judgment's quantum award may be satisfied with something less than a full cash payment now. Arrangement of guaranteed funds available on the anniversary dates of the program's commencement may satisfy the judgment. Additionally the Court would favorably consider a motion to return to defendants a portion of unused funds at the close of each program year in the event the monies allocated for the preceding program year were not fully expended because of a reduction in class size or underutilization by the remaining plaintiffs.

For the reasons set forth below, this Court rejects the argument that a retrial is required as to liability and quantum. *Cf. Scott supra*, at 1285.

As this Court has stated, no court has required it to conduct individualized "accrual' trials relating to, for example, addiction". In fact, *Scott* states that addiction is *not* an issue that must be determined on an individual basis" because "the central common [smoking cessation] question concerning the addictive nature of cigarettes as designed and manufactured by the defendants was answered in

the affirmative during Phase I of the trial." *Id.*, at 1276. The Court is therefore not required to hold any further trials on the issue of liability.

This Court additionally rejects the contention that the trial court is required to conduct new "accrual" trials for an additional purpose, namely, in order to correct the existing award of damages.

This Court is well aware of the exclusion of a group of plaintiffs. This Court recognizes that the current award may be too large. If such a thing proves appropriate, and that has yet to be determined, the award will be corrected, but it will be corrected administratively. *Cf. Scott, supra*, at 1285 ("courts that have addressed the issues in other jurisdictions have held that such "individualized" eligibility determinations should be made administratively, not by a jury.")

This Court finds in the *Scott* opinion a mandate to proceed with more rigor to the creation of the court-supervised smoking cessation fund. *Scott v. American Tobacco Co., Inc.*, 04-2095 (La App. 4th Cir. 2/7/07), 949 So.2d 1266, 1285 (referring to "[t]he administration of [a] court supervised and court-directed trust fund [which] will then determine eligibility to participate").

Since eligibility determinations and costs associated with them or produced by them are strongly related, the language just quoted persuades the Court that *Scott* envisions administrative decisions at this stage of this litigation. *Scott, supra*, at 1285. ("None of the cases cited by the defendants... hold that there must be an individualized series of jury trials to determine whether each class member is eligible to participate

in a court-supervised cessation program. To the contrary, courts that have addressed the issues in other jurisdictions have held that such 'individualized' eligibility determinations should be made administratively, not by a jury.")

The Court disagrees that the defendants have a right to more trials. The Court concludes that the reviewing courts have decided that there have been enough trials and that the time for concrete, remedial action has arrived.

This Court's conviction and opinion is reinforced by language in the *Scott* opinion. The Court is convinced that this is the decision required by *Scott*. The Trial Court's responsibility is clear; the Trial Court has been ordered to conduct "further proceedings" that conform to *Scott Cf. Scott v. American Co., Inc.*, 04-2095 (La. App. 4 Cir. 2/7/07), 949 So.2d 1266, 1290. ("We remand this matter for further proceedings.") In their papers, the defendants agree that *Scott* is controlling. This Court believes these to be the Reasons most faithful to the Fourth Circuit *Scott* opinion.

1. ***Neither of the Cross-Motions Has Merit***

The Court rejects the Defendants' contention that the class judicially confessed that every claim in this case accrued after the effective date of the LPLA and that the defendants are therefore entitled to Judgment in their favor.

Scott's acceptance of the continuing tort theory for prescription purposes establishes that the class consists of many thousands of persons whose claims accrued, *for smoking cessation purposes*, decades ago. *Cf. Scott, supra*, at 1280 (noting that under continuing tort theory accepted by *Scott* prescription

does not even begin to run until cause of damages is abated).

For the sake of argument, this Court accepts the defendants' description of the doctrine of judicial confession. Nevertheless, it is clear that the doctrine is equitable in nature. Given *Scott's* treatment of the significance of the continuing tort theory, this Court cannot conclude that it would be equitable to hold that the class are precluded from establishing that their smoking cessation claims accrued prior to September 1, 1988.

Scott concluded that the tort in this action continued for decades "at least through the date this suit was filed ..." *Id.* For the same reasons set forth in *Owens v. Martin*, 449 So.2d 448, 451 n. 4 (La. 1984) with regard to the suspension effected by *contra non valentem* in a latent injury case, the dismissal argument the defendants make on the basis of *Scott* is without merit.

This Court likewise rejects the claim that the Court must hold further trials to identify class members who started smoking prior to the date of the LPLA who have smoking cessation claims that accrued prior to LPLA's effective date, class members the *Scott* court has called the "remaining plaintiffs." *See Scott, supra*, at 1275 (the "remaining plaintiffs" are the pre-1988 smokers whose claim accrued before 1988). The Court therefore reject [sic] the defendants' Motion insofar as it seeks the entry of additional case management and trial orders laying the foundation for additional trials on liability and damages.

Defendants argue that this Court must conduct one or more additional trials to decide liability and

damages with regard to the "excluded plaintiffs". [S]uch plaintiffs are "the post-1988 smokers and pre-1988 smokers, whose injury accrued after that date." *Id.* (defining "excluded plaintiffs" as those class members who are "the post-1988 smokers and pre-1988 smokers, whose injury accrued after that date.")

Defendants insist that the excluded plaintiffs can only be identified with the evidence set forth in their papers. This Court finds absolutely no support for the defendants' argument in *Scott*. This Court does not agree that *Scott* requires conducting one or more new trials to effect such a reduction. On the contrary, *Scott* does not require this Court to conduct individualized trials to determine whether each class member is eligible to participate in a court-supervised cessation program or is excluded from it. *Scott* holds that "such 'individualized' eligibility determinations *should be made administratively*, not by a jury." *Scott, supra*, at 1285.

If individualized eligibility trials are not required, this Court fails to see why further trials must be held to determine what the eligibility determinations will cost. Furthermore, nowhere in *Scott* is it stated that new trials are required.

Scott, utilized the *Bourgeois* factors to conclude that the defendants are liable for a smoking cessation program that will benefit the "remaining plaintiffs." There is no support for the assertion that each class member must now retry *Bourgeois* on an individual basis.

Scott determined conclusively, in light of the actions of the Supreme Court, that the defendants are liable to fund a smoking cessation program based

on behavior that leads to liability under the *Bourgeois* factors. *See also Scott, supra*, at 1283-84 (reviewing factors used by jury as basis for awarding cessation program). The liability of the defendants has thus been finally determined. The law does not require further trials of the *Bourgeois* factors on a more microscopic level. To the contrary, liability and eligibility are distinct concepts.

As the *Scott* Court explicitly held, "courts that have addressed the issues in other jurisdictions have held that ... 'individualized' eligibility determinations should be made administratively, not by a jury." *Scott supra*, at 1285.

Based on this and other language, this Court finds that the remaining plaintiffs are eligible for smoking cessation therapy. This Court finds that they are eligible for such therapy based on addiction, dependency, habitual use or other similar use entitling the class member to therapy in the opinion of a professional making an administrative, eligibility decision on behalf of the Fund. *Cf. Scott, supra*, at 1276 ("In light of these facts [i.e., that all of the experts, including the defendants' experts, conceded that "cessation is recommended for all smokers, whether dependent, addicted or habituated"] and since smoking cessation is desirable regardless of addiction, we find that addiction is not an issue that must be determined on an individual basis.")

The Fund will be authorized to quantify and will quantify the costs associated with making eligibility determinations for the remaining plaintiffs and providing smoking cessation therapy to them. The administrative management of these costs will be informed, professional and focused.

But inasmuch as the *Scott* Court held that "'individualized' eligibility determinations should be made administratively, not by a jury", *Scott, supra*, at 1285, this Court concludes that such costs can and should be determined administratively, under this Court's supervision, and indeed that they are best calculated this way at this time.

This Court agrees that *Scott* "limited the class ... by excluding a large group [o]f plaintiffs." *Id.*, at 1285. This Court also recognizes that "[o]nly the remaining plaintiffs are eligible to seek cessation assistance." *Id.* This Court also appreciates that *Scott* "specifically f[ou]nd that the members of the excluded class are not eligible to receive any type of award." *Id.*, at 1275-76.

A long passage in the *Scott* opinion reinforces this Court's conviction and conclusion that this Court should proceed to create a court supervised and court-directed trust fund. The portion of *Scott* opinion entitled, "Assignment of Error No. 1", *see id.*, at 1276-77, addresses the defendants' contention that this Court committed a series of errors when this Court held the defendants liable to the plaintiffs without requiring significant proof of addiction; defendants insist that the required proof cannot be adduced on a class wide basis. *See id.*, at 1278. The defendants' papers fundamentally recapitulate this assignment of error, in my view.

Scott observed:

> Defendants claim that the plaintiffs are required to prove that each individual class member is addicted to cigarettes, as a prerequisite to participate in a program. However, the jury determined that the intent

> was, and is, to encourage addiction, which results in a significantly increased risk of developing serious illness or disease. No class member or other person who is not dependent on cigarettes would consider availing himself of a cessation program. Therefore, as a matter of due process for *res judicata* purposes, defendants do not need to know precisely who is in the class, nor is it necessary that each and every class member be determined to be clinically addicted to nicotine. The only people who will participate in this program will be those who desire to participate: those who are addicted or dependent upon nicotine. [The law does not] require[ ] that in order to participate in the cessation program, a plaintiff must prove that he is addicted to something,

Id., at 1276 (emphasis added).

The Court finds this language just as relevant to these motions as this language was to the case-in-chief.

Scott rejected this assignment of error, *see id.*, at 1277, concluding "that addiction and injury were properly proven at trial by the remaining [un-excluded] plaintiffs." *Id.*, at 1276-77 (emphasis added). This Court finds this language as relevant to these motions as they were to the case-in-chief.

Noting that all of the experts, including the defendants' experts, had conceded that "cessation is recommended for all smokers, whether dependent, addicted or habituated", *Scott* remarked, "In light of these facts and since smoking cessation is desirable regardless of addiction, we find that addiction is not

an issue that must be determined on an individual basis." *Id.*, at 1276.

This Court finds the discrepancy between the defendants' contentions concerning the need for additional trials and language like the language just quoted indicative of the inappropriateness of the defendant's arguments. The defendants consider addiction a crucial, accrual standard. For example, the defendants assert that one of the accrual guideposts should be expert testimony that a class member started smoking in at least 1978. Such a position is directly in conflict with *Scott, id.*, and suggests to me that the defendants' arguments are broadly without merit.

Scott stresses that "addiction is not an issue that must be determined on an individual basis ..." *Id.*, at 1276. By virtue of their smoking, "smokers are at a significantly increased risk of harm, and ... cessation is [therefore] recommended for *all* smokers whether dependent, addicted or habituated." *Id.*, at 1276.

The defendants are not entitled to a new trial on liability or damages in the wake of *Scotts'* determination that there is a group of excluded plaintiffs.

Scott has directed this Court to proceed with the creation of an administrative "court supervised and court-directed trust fund" mechanism "[which] will ... determine eligibility to participate" in the smoking cessation program. *Scott, supra*, at 1285. In connection with this Court's admitted power and responsibility to supervise this administrative mechanism, this Court will craft a Plan to address both "accrual" (eligibility) and funding.

The defendants will argue that this Court has conflated eligibility and damages in a way that deprives them of due process. As stated, above, this Court's response to this contention is that the defendants have made this basic argument before, only to see it rejected. *Cf. Scott supra*, at 1276 ("... as a matter of due process for *res judicata* purposes, defendants do not need to know precisely who is in the class, nor is it necessary that each and every class member be determined to be clinically addicted to nicotine.")

The defendants were entitled to have a trial on the question of their liability for smoking cessation therapy, and they were likewise entitled to a trial on the question of the scope of their liability, if it existed. They received that trial, lost it, had their loss reviewed in depth by the appellate court, and had the Louisiana Supreme Court consider whether the decision of the court of appeal warranted certiorari.

Thus, the defendants have had the benefit of a great deal of process, and indeed, were successful, on appeal, in having the court of appeal "pare" down the award. *Id.*, at 1285. ("Phase II of the trial answered the questions of how many class members were addicted, dependent, or had otherwise suffered an injury; how many of those class members would benefit from one or more smoking cessation methods; and how many would likely avail themselves of those methods. This Court has pared down that group further.")

Clearly, excluded plaintiffs are not eligible. On this point, *Scott* is clear. However, the Court concludes that the time has arrived to create the Fund and to design it in a way that will conform to

the dictates in *Scott*. The funding analysis will not tread on the components excluded by *Scott*. In accordance with *Scott* and its vision of a court-supervised Program, this Court will ensure that the eligibility criteria address exclusion and funding.

This 21st day of July, at New Orleans, Louisiana.

/s/
RICHARD J. GANUCHEAU
JUDGE, *AD HOC*

APPENDIX G

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 96-8461 *AD HOC* DIVISION DOCKET NO.

GLORIA SCOTT and DEANIA M. JACKSON,

on behalf of themselves and all others similarly situated

versus

THE AMERICAN TOBACCO COMPANY, INC., et al

JUDGMENT

THIS MATTER came before the Court, tried before a Jury, in two phases, from June 18, 2001 thru May 21, 2004, pursuant to former Louisiana Code of Civil Procedure Article 593.1, and in accordance with CMO#2, Trial Order No. 5, the November 15, 2002 Order and Opinion of the Louisiana Supreme Court,[1] and Trial Order No. 10[2];

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[1] *Scott v. American Tobacco*, No. 2002-2449 (La. 11/15/02), 830 So.2d 294.

[2] Defendants objected to Trial Order No. 10, and sought writs, which were denied. 2003-1872 (La. App. 4 Cir. 12/5/03), *writ denied*, No. 2004-0008 (La. 2/13/04), 867 So.2d 691.

CONSIDERING the evidence presented, the Phase I findings of the Jury set forth in the Special Verdict of July 28, 2003 which the Court adopts, the Phase II findings of the Jury set forth in the Special Verdict of May 21, 2003 which the Court adopts, the Court's Findings of Fact, equitable considerations and applicable principles of equity and law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants, Philip Morris, Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Brown & Williamson Tobacco Company, individually and as successor to the interests of the American Tobacco Company, and the Tobacco Institute, are liable, jointly, severally, and *in solido*, to the certified Plaintiff Class,[3] for funding the cost of a court supervised smoking cessation program including the establishment, implementation and administration of the program set out below;

IT IS FURTHERED ORDERED THAT the court-supervised program will consist of a comprehensive smoking-cessation program, which will include the following components: (i) reimbursement of smoking-cessation-related medication; (ii) telephone quitlines; (iii) health system interventions; (iv) intensive cessation programs; (v) development of cessation capacity; (vi) community cessation programs; (vii) marketing and education; (viii) evaluation of program effectiveness; (ix) local centers of cessation excellence; (x)

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[3] The approved class definition may be found in *Scott v. American Tobacco Co.*, No. 98-0452 (La. App. 4th Cir. 11/4/98), 725 So.2d 10, *writ denied*, No. 98-3016 (La. 2/26/99), 731 So.2d 189.

development of program standards; (xi) monitoring and auditing; and, (xii) training and technical assistance.

IT IS FURTHER ORDERED THAT the court-supervised comprehensive cessation program will, subject to the supervision of the Court, be administered by a third-party administrator appointed by the Court which is hereby authorized to perform whatever acts are necessary to implement the cessation program described herein;

DEFENDANTS ARE HEREBY ORDERED to deposit Five Hundred and Ninety-One Million, Three Hundred and Forty-Two Thousand, Four Hundred and Seventy Six Dollars and Fifty-Five Cents ($591,342,476.55), together with judicial interest thereon from the date of judicial demand until paid, into the Registry of the Civil District Court for the Parish of Orleans in trust for the Plaintiff class, for the funding of the court-supervised comprehensive cessation program;

THIS JUDGMENT is hereby designated a final and appealable judgment within the meaning of Louisiana Code of Civil Procedure Article 1915(B).

THE COURT will retain jurisdiction over this case with respect to the establishment, implementation, supervision, and administration of the court-supervised fund, court-supervised cessation program and to resolve all other outstanding issues, including, but not limited to, the assessment of court costs and/or attorneys fees and for any subsequent phase of this trial deemed necessary in accordance with Louisiana Code of Civil Procedure Article 593.1.

READ, RENDERED, AND SIGNED this 30th day of June, 2004, at New Orleans, Louisiana.

Richard J. Ganucheau

RICHARD J. GANUCHEAU
JUDGE, *AD HOC*

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APPENDIX H

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 96-8461 *AD HOC* DIVISION DOCKET NO.

GLORIA SCOTT and DEANIA M. JACKSON,

on behalf of themselves and all others similarly situated

versus

THE AMERICAN TOBACCO COMPANY, INC., et al

FINDINGS OF FACT AND REASONS FOR JUDGMENT

This matter came before the Court, tried before a Jury, in two phases, from June 18, 2001, thru May 21, 2004, pursuant to former Louisiana Code of Civil Procedure Article 593.1, and in accordance with CMO#2, Trial Order No. 5, the November 15, 2002

Order and Opinion of the Louisiana Supreme Court,[1] and Trial Order No. 10.[2]

The Court has issued a Judgment, pursuant to Louisiana Code of Civil Procedure Articles 1812 and 1915(B): (i) holding Defendants, Philip Morris, Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Brown & Williamson Tobacco Company, individually and as successor to the interests of the American Tobacco Company, and the Tobacco Institute, liable, jointly, severally, and *in solido*, to the certified Plaintiff Class[3] to provide funding for the establishment, implementation, and administration of a court-supervised smoking cessation program; (ii) ordering Defendants to deposit Five Hundred and Ninety-One Million, Three Hundred and Forty-Two Thousand, Four Hundred and Seventy Six Dollars and Fifty-Five Cents ($591,342,476.55), together with judicial interest thereon from the date of judicial demand until paid, into the Registry of the Court in trust for the Plaintiff Class; and, (iii) retaining jurisdiction over the case with respect to the establishment, implementation, supervision, and administration of the court-supervised fund and court-supervised cessation program, to resolve all other outstanding

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[1] *Scott v. American Tobacco*, 2002-2449 (La. 11/15/02), 830 So.2d 294.

[2] Defendants objected to Trial Order No. 10, and sought writs, which were denied. 2003-1872 (La. App. 4 Cir. 12/5/03), *writ denied*, No. 2004-0008 (La. 2/13/04), 867 So.2d 691.

[3] The approved class definition may be found in *Scott v. American Tobacco Co.*, No. 98-0452 (La. App. 4th Cir. 11/4/98), 725 So.2d 10, *writ denied*, No. 98-3016 (La. 2/26/99), 731 So.2d 189.

issues, including, but not limited to, the assessment of court costs and/or attorneys fees and for any subsequent phases of this trial deemed necessary in accordance with Louisiana Code of Civil Procedure Article 593.1.

The Findings of Fact and Reasons for Judgment, supplementing the Court's *Per Curiam* to the Louisiana Fourth Circuit Court of Appeal dated November 4, 2003, are contained herein.

I. PHASE I – Liability

The Phase I Trial in this matter was conducted in accordance with the Supreme Court of Louisiana's Order and Opinion of November 15, 2002.[4] The Phase I Trial adjudicated all common issues of liability (fault and causation), including the *Bourgeois*[5] factors, together with all applicable class-wide defenses and affirmative defenses. The jury rendered a Special Verdict in accordance with Louisiana Code of Civil Procedure Article 1812 on July 28, 2003.

After six months of trial at which numerous fact and expert witnesses testified and during which thousands of internal tobacco company documents were admitted and read to the jury,[6] the jury found

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[4] *Scott v. American Tobacco*, 2002-2449 (La. 11/15/02), 830 So.2d 294.

[5] *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188 (La. 7/8/98), 716 So.2d 355.

[6] As noted in the Court's November 2003 *Per Curiam*, the Trial Court and the Special Master heard nearly 200 motions from January 2001 through January 21, 2003. Additional numerous motions were filed and decided during the trial. The court, before and during this trial (jury selection commenced June 18, 2001, opening statements were delivered on January 21, 2003),

that the defendants, individually and conspiring with each other, knowingly and deliberately conspired to commit and did commit fraud that spanned five decades directly causing injury to the class of Louisiana smokers. The jury found that these defendants knowingly and deliberately addicted the population of Louisiana smokers to a product known by them to be both addictive and extremely toxic, with full knowledge that over 400,000 Americans (including 7,000 Louisianans) die each year from smoking related illnesses and diseases, illnesses and diseases known to these defendants to be caused by their products for at least 50 years, all the while denying that smoking caused disease and then conspiring to keep the "smoking and health question" open. In short, the jury found that these defendants created a false "controversy" to keep the class of Louisiana smokers smoking, all the while assuring them that they would investigate the relationship between smoking and health and then would tell the truth about these issues to the class. The jury also found that the defendants' conduct significantly increased the risk of the class to

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heard argument on and ruled upon thousands of pages of deposition testimony and heard argument on and ruled upon the admissibility of thousands of pages of documents, mostly previously secret internal tobacco company documents. At the Phase I liability trial, the trial court and the jury heard from 44 fact and expert witnesses and this court ruled on the admissibility of thousands of additional documents (including documents claimed to be privileged), again mainly previously secret tobacco company internal documents. During Phase II, the trial court and the jury heard from eight expert witnesses over the course of several weeks; in addition to the Phase I exhibits, approximately 100 new documentary exhibits were offered and received into evidence. The record in this case now amounts to well over 30,000 pages.

contract four serious latent diseases. The jury found that the defendants' intentionally misrepresented and lied about all of this, thereby subjecting these defendants to liability for the funding of cessation of smoking programs to ameliorate the harm caused by the defendants' actions and their products.

The jury determined that these defendants intentionally designed their cigarette products for the explicit purpose of creating and perpetuating an addiction to nicotine in order to create a dependence on nicotine that would facilitate the sale of their products thereby reaping profits in the State of Louisiana, all the while denying that nicotine is addictive. The jury found that these defendants knew that their cigarettes contained nicotine at levels that caused and maintained addiction, consciously desiring to promote addiction, yet failed to tell the truth about what they knew about nicotine as an addictive substance.[7]

The jury found that smoking cigarettes gives rise to significant exposure to substances proven hazardous to human health, determined that the defendants knew that their cigarettes contained substances proven hazardous to human health yet failed to tell the truth about what they knew about their cigarettes, thereby exposing the class of Louisiana smokers to significant levels of substances proven hazardous to human health sufficient to significantly increase the risk of contracting four latent diseases related to cigarettes.[8] In summary, the jury determined that the actions of these defendants increased the risk of harm to the entire

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[7] Phase I Special Verdict Findings Nos. 7, 8, 10, 11, 15, 16, 17.

[8] Phase I Special Verdict Findings Nos. 12-14, 17.

class of Louisiana smokers and determined the remedy to be cessation assistance.[9]

With respect to the plaintiffs' claims of fraud, (properly tried in accordance with the Supreme Court's November 15, 2002 Order), the jury found that the defendants intentionally engaged in actions designed to distort the body of public knowledge concerning nicotine and smoking and health, that there was detrimental reliance on that distorted body of knowledge by an intended and foreseeable class of Louisiana citizens, and that the defendants' actions, between January, 1954 and May 24, 1996 (the date the Scott Petition was filed), were a substantial factor in causing the distortion of the body of public knowledge concerning the properties of nicotine and a substantial factor in causing a distortion of the body of public knowledge concerning smoking and health.[10]

With respect to the Plaintiff Class' claim of conspiracy, the jury found that the tobacco company defendants conspired among themselves and with the Tobacco Institute, (the false-"front" public relations arm of the cigarette manufacturers created to foster the public illusion that the manufacturers were actually researching the truth behind the smoking and health "controversy"),[11] to distort the body of public knowledge concerning smoking and health and the properties of nicotine, found that the conspiracy caused or contributed to the need for

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[9] Phase I Special Verdict Findings Nos. 17, 50-54, 61-64. *See also*, Phase I Special Verdict Findings Nos. 30, 32, 34, 39, 41-43.

[10] Phase I Special Verdict Findings Nos. 18-30.

[11] Phase I Special Verdict Finding No. 18.

medical monitoring and cessation of smoking assistance and found that these defendants conspired among themselves to create the idea that there was a real "controversy" about smoking and health issues that caused or contributed to the need for medical monitoring and cessation of smoking programs.[12]

This trial Court determined and instructed the jury, as a matter of law, based on the Phase I trial record that the defendant manufacturers voluntarily assumed the duty to investigate and then to disclose the true relationship between smoking and disease.[13] On the Plaintiffs' claim of breach of those voluntarily assumed duties, the jury found that the defendants intentionally decided not to investigate and disclose the true facts known to them concerning the relationship between smoking and diseases through channels other than advertising and promotion and found that such intentional decisions were a substantial factor in causing the class to smoke and continue to smoke and that their conduct

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[12] Phase I Special Verdict Findings Nos. 31-34. The jury also determined that the defendants conspired among themselves to refrain from conducting scientific and medical research on the relationship between smoking and disease, but that such conspiracy did not cause or contribute to the need for medical monitoring and cessation of smoking assistance. *See* Phase I Special Verdict Findings Nos. 35-36.

[13] Ex. 130. *See also, e.g.*, Exs. 138.01, 439.02, 443.02, 444.02, 447.02, 5281, 5318, 5392, 5439. *See also, e.g.*, Exs. 137.01, 5712, 5713, 5288 (which were not formally admitted into evidence during the trial, but which were submitted and reviewed during various pre-trial proceedings and relied upon as the basis for various expert testimony and/or demonstrative aids).

caused or contributed to the need for medical monitoring and cessation of smoking assistance.[14]

This trial Court also determined and instructed the jury, as a matter of law, based on the Phase I trial record that the defendant manufacturers assumed a duty not to market their cigarettes to the children of Louisiana.[15] The jury found that the defendants intentionally breached that assumed duty, that such breach caused minors to smoke and was a substantial factor that caused minors to continue to smoke.[16]

The Phase I jury recognized the Class' right to medical monitoring,[17] but determined that the

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[14] Phase I Special Verdict Findings Nos. 37-39.

[15] *See, e.g.*, Exs. 1460, 3162, 3726, 1814.01, SA-58, 5152, and *NCI Monograph 14* (Ex. 762.02) at p. 201; Cummings, Tr. pp. 13390-13391; Orlowsky Testimony, Tr. pp. 13884-13888, (*see also*, Ex. 2891).

[16] Phase I Special Verdict Findings Nos. 40-43.

[17] Special Jury Finding No. 50 (defendants' cigarettes are "are hazardous to human health"); Special Jury Finding No. 51 (smoking defendants' cigarettes "significantly exposed smokers to proven hazardous substances"); Special Jury Finding No. 52 (as a direct result of using defendants' cigarettes, "the class suffers a significantly increased risk of contracting" lung cancer, bladder cancer, chronic obstructive pulmonary disease, and cardiovascular disease); Special Jury Finding No. 53 (the class's risk of contracting "lung cancer, bladder cancer, COPD, and cardiovascular disease "is greater than it would have been had they not been exposed to cigarettes manufactured and sold by the defendants in Louisiana"); Special Jury Finding No. 54 (the class's risk of contracting lung cancer, bladder cancer, COPD, and cardiovascular disease "is greater than the risk members of the public at large face with regard to the same serious latent diseases"); Special Jury Finding No. 55 (procedures exist which make early detection of lung cancer,

specific tests at issue had not yet gained sufficient support from the medical community.[18] The establishment of the court-supervised medical monitoring and/or cessation program is therefore supported by the jury's findings, but limited, at this point,[19] to cessation.[20]

Finally, with respect to the issue of consent, the jury determined that the class of Louisiana smokers did not know that cigarettes manufactured by these defendants were designed and manufactured to cause addiction and that such addiction thus caused would expose the class to significant levels of substances proven hazardous to human health.[21]

II. PHASE II – Cessation Program and Costs

The Phase II trial was held in accordance with former Louisiana Code of Civil Procedure Article 593.1(c)(2) and (c)(3) to determine all items of damage common to the class as a whole and the basis for assessment of those items of damage. In particular, the parties presented evidence regarding

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bladder cancer, heart disease and COPD possible); Special Jury Finding No. 60 (there is demonstrated value in early detection). *See also*, Special Jury Finding Nos. 29, 30, 32, 34, 38 (Defendants' conduct "caused or contributed to the need for medical monitoring and cessation of smoking programs").

[18] Special Jury Finding Nos. 56-59.

[19] In *Bourgeois*, the Court noted that "if a test is later developed that will detect the disease, plaintiff would retain the right to demonstrate the effectiveness of the test and be compensated for utilizing it, assuming plaintiff can satisfy the other elements of the damage proof." 716 So.2d at 361.

[20] Phase I Special Verdict Findings Nos. 60-64.

[21] Phase I Special Verdict Findings No. 65.

the nature, types and components of the cessation of smoking programs, the parameters of such programs, the procedures to be adopted for the establishment, implementation, delivery and administration of such programs, the requirements for eligibility of the class of Louisiana smokers who desire to participate in such programs, the duration of the programs, methods for insertion of these programs into the existing public and private healthcare infrastructure in the State of Louisiana, the cost of the programs and the procedures far the establishment and the administration of the court-supervised fund.[22]

This trial Court is of the opinion that the Phase II proceedings relating to the establishment of a court-supervised cessation program are equitable or injunctive in nature, thereby removing any necessity for a trial by jury.[23] *See, Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 982 (Utah, 1993), *Ayers v. Township of Jackson*, 525 A.2d 287.314 (N.J. 1987), *Redland Soccer Club v. Department of the Army*, 696 A.2d 137, 142 n. 6 (Pa. 1997), *Petito v. A.H. Robins*, 750 So.2d 103, 105 (Fla. App. 3 Dist 1999), *review denied*, 780 So.2d 912 (Fla. 2001), *In re Teletronics*, 172 F.R.D. 271 (S.D. Ohio 1997), *Craft v. Vanderbilt*, 174 F.R.D. 396 (M.D. Tenn. 1996), *Gibbs v. DuPont*, 876 F.Supp. 475 (W.D.N.Y. 1995), *Day v. NLO*, 144 F.R.D. 330 (S.D. Ohio 1992) *and* 851 F.Supp. 869

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[22] Trial Order No. 10, ¶ II. *See also*, Transcript, pp. 24730-24731.

[23] La. Code Civ. Pro. Art. 1732(3); *see also*, *Bourgeois*, 716 So.2d at 362 n. 16 (trial courts are free to develop procedures for the establishment and administration of a medical monitoring program, as appropriate).

(S.D. Ohio 1994), *Yslava v. Hughes Aircraft*, 845 F.Supp. 705 (D. Ariz. 1993), *Cook v. Rockwell International*, 151 F.R.D. 378 (D. Colo. 1993). Significantly, in this regard, the Supreme Court of Louisiana specifically relied upon *Hanson*, *supra*, *Ayers*, *supra*, and *Redland Soccer*, *supra*, as a basis for the Louisiana medical monitoring remedy. *Bourgeois*, 716 So.2d at 359-360.[24] Commentators have similarly noted that a court-administered fund, which establishes "pooled resources" for the early detection and advances in treatment of the disease is injunctive in nature. Schwartz and Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, 10 Tul. Envtl. L.J. 187, 198 (1997).[25] However, out of an abundance of caution, and to remain consistent with Trial Order No. 1, the Phase II Trial was tried before the same jury. The Court considers the jury's Phase II findings advisory in nature, and therefore makes its own detailed findings with respect to the evidence presented in Phase II.

The Plaintiff Class called four witnesses: Dr. David Burns, Dr. Greg Connolly, Dr. Sarah Moody-Thomas, and Dr. Harvey Rosen. Dr. David Burns, who also testified during Phase I, is nationally

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[24] *See also*, *Bourgeois*, 716 So.2d at 362 n.16 (trial courts are free to develop procedures for the establishment and administration of a medical monitoring program, as appropriate). *See also, generally*: La. Civ. Code art. 4 (when no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity).

[25] *See also*, LAPEZE, *Implications of Amending Civil Code Article 2315 on Toxic Torts in Louisiana*, 60 La. L. Rev. 833 (2000) ("this equitable solution would reap benefits for both victims of exposure and negligent defendants").

renowned in the area of smoking and health.[26] He has served as the editor, a senior editor, or a scientific advisor with respect to numerous Surgeon Generals' Reports, including the 2000 Report on cessation,[27] and National Cancer Institute Monographs, including Monograph 1 ("Strategies to Control Tobacco Use in the United States"), Monograph 5 ("Tobacco and the Clinician: Interventions for Medical and Dental Practice") and Monograph 12 ("Population Based Smoking Cessation").[28] Dr. Burns served on the Tobacco Education and Research Oversight Committee in California, which was responsible for a comprehensive state-wide smoking cessation program in the State of California,[29] as well as the Surveillance Implementation Group for the National Cancer Institute.[30] Dr. Burns was accepted, without objection, as an expert in comprehensive state cessation programs and specifically on the issues which the Court directed there be testimony in Phase II.[31]

Dr. Greg Connolly is currently a Professor at the Harvard School of Public Health and an advisor to the Massachusetts Department of Public Health.[32]

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[26] Transcript, pp. 11388-11425.

[27] Transcript, p. 11409.

[28] Transcript, pp. 26916-26917, 26922-24928.

[29] Transcript, p. 24918.

[30] Transcript, p. 24919.

[31] Transcript, p. 24936.

[32] Transcript, pp. 25614-25615.

From 1993 to 2003, Dr. Connolly served as the Director of the Massachusetts Tobacco Control Program, which was a comprehensive tobacco control program, with a budget of $56 Million per year.[33] He was involved in the design and the development of the program, budget and other cost allocations, implementation of the program, and administration thereof.[34] Dr. Connolly, like Dr. Burns, has authored, edited, and/or reviewed numerous publications in the field of smoking and health, including, particularly, smoking cessation.[35] Dr. Connolly was accepted, without objection, in the fields of cigarette smoking cessation; public health; public health administration; the development and the design and the nature, types, and components of cessation programs; parameters of programs; duration of programs; methods for insertion of programs into the existing infrastructure; and the costs for establishing and administering such programs.[36]

Dr. Sarah Moody-Thomas is a Professor in the School of Public Health at LSU. She also serves as the clinical lead of the tobacco control initiative in the ten public hospitals within the State.[37] Dr. Moody-Thomas was accepted as an expert in the field of clinical psychology, with a specialty in recruitment, adherence and retention to cancer-

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[33] Transcript, p. 25621.

[34] Transcript, pp. 25624-25625, 25634-25635.

[35] Transcript, pp. 25623-25624.

[36] Transcript, p. 25649.

[37] Transcript, p. 25922.

control and prevention programs, especially with regard to underserved and at-risk populations.[38]

Finally, Dr. Rosen was accepted, without objection, as an expert economist, with particular expertise in computing the present value of future funding requirements.[39]

Defendants called four witnesses: Dr. William Nassetta, Dr. Eric Kaplan, Dr. Donald House, and Mr. Harold Aucoin. Dr. Nassetta is an occupational physician with a Masters Degree in Public Health.[40] Dr. Nassetta testified that he was involved in the creation and/or administration of worksite cessation programs offered to employees of Exxon and NASA.[41] Dr. Nassetta was accepted as an expert in internal medicine, occupational and preventative medicine, public health, the evaluation of public health and preventative medicine programs, smoking cessation and cessation methods and aids.[42]

Dr. Kaplan is a psychiatrist who has specialized in treatment of patients suffering from various forms of substance abuse.[43] He was accepted as an expert in the fields of psychiatry, substance dependence, nicotine dependence, human behavior, pharmacotherapy, smoking cessation, and methods

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[38] Transcript, p. 25936.

[39] Transcript, p. 26195.

[40] Transcript, pp. 26422, 26425.

[41] Transcript, pp. 26434-26440.

[42] Transcript, p. 26522.

[43] Transcript, pp. 26786-26787.

and aids used in population-based smoking cessation programs.[44]

Dr. House has a Ph.D. in Economics. He has been employed by organizations such as the American Medical Association, the American Dental Association, the U.S. Department of Health and Human Services, and the Department of Health Education and Welfare, to create economic models and to forecast healthcare costs.[45] Dr. House was accepted as an expert in healthcare prices.[46]

Mr. Harold Aucoin is a senior vice president at Gilsbar, which serves as a third-party administrator for various health plans.[47]

The parties further stipulated that all evidence admitted during the Phase I Trial would be deemed admitted in Phase II.[48]

The Program Proposed By the Plaintiff Class

The program, and a proposed budget for same, was presented by the Plaintiff Class and admitted into evidence, in summary form, as Plaintiffs' Exhibit 7691. The program was based primarily on the experience of Dr. Burns and Dr. Connolly in California, Massachusetts, and elsewhere;[49] NCI

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[44] Transcript, p. 26919.

[45] Transcript, pp. 27154-27161.

[46] Transcript, p. 27236.

[47] Transcript, pp. 27533-27534.

[48] Transcript, p 25162.

[49] Dr. Burns and Dr. Connolly also collaborated with Dr. Tom Houston, "an internationally recognized expert on smoking cessation in general and cessation in particular. And he was the senior person for the American Medical Association on

Monographs;[50] Surgeon Generals' Reports;[51] the Center for Disease Control *Best Practices* publication relating to tobacco control including cessation;[52] and the *Clinical Practice Guidelines: Treating Tobacco Use and Dependence*.[53] Dr. Moody-Thomas additionally testified how these twelve components were consistent with the 20-step program she uses for the establishment of an effective cessation program.[54]

Components

The Plaintiff Class presented a comprehensive program consisting of twelve components:

(1) reimbursement of smoking-cessation-related medication; (2) telephone quitlines; (3) health system interventions; (4) intensive cessation programs; (5) development of cessation capacity; (6) community cessation programs; (7) marketing and education; (8) evaluation of program effectiveness; (9) local centers of cessation excellence; (10) development of program

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tobacco issues." Transcript, p. 24934. Dr. Houston was listed as a "will call" witness by the Plaintiff Class, and submitted an expert report; however, following the testimony of Plaintiffs' other witnesses, the parties agreed, by stipulation, that Dr. Houston would not need to testify, and that there would be no adverse presumption associated with the fact that he was not called to testify. Transcript, pp. 26033-26034.

[50] Particularly Monographs 1, 5, and 12; Exs. 0922, 327.01, 1144.01.

[51] Particularly the 2000 and 2001 Reports, Exs. 587.01, 472.02.

[52] Ex. 0914.

[53] Ex. 1096.01.

[54] Transcript, pp. 25944-25950.

standards; (11) monitoring and auditing; and, (12) training and technical assistance.

The evidence regarding these twelve components was essentially uncontested. The Defendants did not call one witness to testify that either a comprehensive program or that any one of more of the twelve components recommended by Plaintiffs' experts was not appropriate, effective, or reasonably necessary in accordance with contemporary medical and scientific principles. Defense counsel, moreover, in opening statement, admitted that the cessation aids identified in components 1-4 are effective and recommended by all of the experts.[55] Defense counsel also admitted, with respect to component 7, that "we all agree that there should be an advertising program" – at least "at the beginning."[56] Dr. Nassetta testified as to the appropriateness of medical intervention, counseling, and other aids,[57] as well as the necessity for monitoring and evaluation.[58]

The jury found that all twelve components recommended by the Plaintiff Class should be included in the court-supervised program,[59] and, based on a preponderance of the evidence, the Court agrees. The jury's findings are fully supported by the evidence, much of which was uncontradicted.

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[55] Transcript, p. 24843.

[56] Transcript, p. 24862.

[57] Transcript, pp. 26613-26615.

[58] Transcript, p. 26460.

[59] *See* Phase II Special Verdict Findings, Section III, Question 3, Components 1-12.

Duration

The Plaintiff Class proposed that the program last at least 25 years. The Plaintiff Class submitted evidence that a long-term program is necessary, because tobacco dependence is a chronic condition; there are numerous barriers to quitting; on average, it takes somewhere from 6 to 10 quit attempts; the risk of relapse can persist for several years; and the benefits of cessation continue to produce medical benefits for members of the class, (some of whom are as young as only 22 years-old), all the way into their 60s or 70s.[60] The 2001 Surgeon General's Report, for example, indicates that, on average, former smokers took 18.6 years to quit smoking, after an average of 10.8 tries.[61] Dr. Burns explained that he budgeted the program for 25 years, because, given expected utilization, quit, and death rates, 90% of the Plaintiff Class will have quit or died over that time period.[62] Dr. Connolly testified that he rendered his report with the expectation that the program would be a permanent program.[63]

While Drs. Nassetta and Kaplan opined that an individual classmember would likely be able to quit within 2-to-3 years, Defendants offered no evidence regarding the appropriate duration of a comprehensive smoking cessation *program*. Indeed, Dr. Nassetta admitted, on cross-examination, that

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60 Transcript, pp. 24958-24961, 24965, 24991-24997, 25023-25024, 25088-25090, 25317, 27712. *See also*, (from Phase I), Transcript, pp. 15421-15437, 15315-15375, and 17700-17709.

61 Transcript, p. 27712; Ex. 472.02 at p. 96.

62 Transcript, pp. 25087-25088.

63 Transcript, p. 25663.

"from a public health measure, you would want to have a continuing program," and that he would continue to treat people who desired to quit, "as long as the smoker is willing to make the effort, regardless of how many times he has done it in the past."[64]

The jury concluded that the program should be funded for 10 years.[65] The Court agrees.

Class Size

The Plaintiff Class determined that the number of current smokers in the class is approximately 505,000 by taking the number of adult smokers from the census data of the Louisiana population as reported in July 1996 and then reducing that number by classmembers who would have quit or died since that time.[66]

The Defendants presented evidence that the number of current smokers within the class was significantly less, (approximately 440,000), because Plaintiffs failed to account for people smoking brands not manufactured by the Defendants, and people who were residents as of May 1996, but who, since that time, have moved out of the State.[67]

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64 Transcript, p. 26625.

65 *See* Phase II Special Verdict Findings, Section III, Question 3, 1(A) – 4(A) and 6(A) – 12(A). The Plaintiff Class proposed that funding for Component 5 would only be required for eight years; the jury found that funding should be provided for five. Phase II Special Verdict Finding, Section III, Question 3, 5(A).

66 Transcript, pp. 25067-25071.

67 Transcript, pp. 27246-27253.

Plaintiffs, however, point out that the migration data relied upon by Defendants only accounts for people who leave the State, and not those who return;[68] in addition, Plaintiffs contend, the number of people who smoke brands not manufactured by Defendants, (which, at any given time, is only approximately 2%)[69] – *and* have *never* smoked cigarettes manufactured by these Defendants – is negligible.

Moreover, Plaintiffs contend that their number is conservative, because it did *not* include: (i) anyone under the age of 18 who was a daily smoker as of May 1996; (ii) anyone who was a "social" or "occasional" smoker as of May 1996, who thereafter became a daily smoker; or, (iii) anyone who had quit prior to May 1996, but later relapsed.[70]

The jury, apparently, accepted the Plaintiff Class' evidence with respect to class size,[71] and, based on the preponderance of the evidence, the Court agrees.

The Court also believes, and instructed the jury, that the "desire to participate" language in the class definition encompasses a desire to participate *at any time* during the life of the program. The Court finds the Defendants' suggestion that, in order to be a class member, you must have desired to participate in a smoking-cessation program on May 24, 1996, (or

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68 Transcript, p. 25267.

69 Transcript, p. 25269; Ex. 7828.

70 Transcript, pp. 25068-25071, 25268.

71 *See* Phase II Special Verdict Findings, Section III, Question 3.

the date of that the Class Notice was issued, or as of any other specific date), to be neither logical nor practical in light of the nature of this class action and the specific relief at issue in this case.

It is important to keep in mind the distinction between the class definition, which determines the preclusive effect of the judgment for *res judicata* purposes, and the group of class members (which may be coextensive with the class definition, but is generally a sub-set of all defined class members) who will actually participate in, receive, or otherwise share in the benefits or other relief.

Plaintiffs filed this class action suit seeking, among other things, compensatory damages arising from nicotine dependence and/or addiction. Certification of these claims was rejected. Instead, the Court certified an alternative, more limited, claim for the establishment of a court-supervised medical monitoring and/or cessation fund.[72] If a smoker never desires to participate in such a program, then he or she is completely unaffected by this class action – irrespective of the result. If, on the other hand, a smoker changes his or her mind – *i.e.* "desires" to participate – then the Judgment is nevertheless binding for *res judicata* purposes. The "desire to participate" is not a pre-requisite for class membership so much as it is a simple recognition of the inescapable fact that only people who desire to participate will participate, while those people who never desire to participate won't. The only people who will be affected by the Judgment – one way or the other – are those people who, *at any point in*

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[72] *Scott*, *supra*, 725 So.2d 10, *writ denied*, No. 98-3016 (La. 2/26/99), 731 So.2d 189.

time, might wish to avail themselves of the benefits of such a program. *See, e.g., Penderson v. Louisiana State University*, 213 F.3d 858, 865 (5th Cir. 2000) (certification appropriate for all female students who may "at any time thereafter" seek to participate in intercollegiate athletics). The class members were provided with notice and given the opportunity to opt out of the class. For those class members who did not opt out, the practical effect and the *res judicata* effect of the Judgment is the same: Anyone who at any time might have desired or may yet desire to participate is bound by the Judgment in this case.

Utilization

The most hotly contested issue during the Phase II Trial was the number of classmembers who were likely to utilize the components offered through the program. Because much of the published literature on existing smoking cessation services describe different types of services or programs, (*e.g.*, use of NRTs, participation in intensive counseling, participation in organized group therapy sessions, use of *all* available aids), and/or different criteria with respect to the percentage of smokers who will participate, (*e.g.* percentage of the population, percentage of plan members, percentage of smokers, percentage of smokers who are trying to quit, percentage of smokers who have tried to quit within the last 30 days), the likely utilization rates seem to vary greatly. Upon closer inspection, however, the utilization rates reported in the literature are fairly consistent, when appropriate comparisons are made.

The Plaintiff Class starts from the premise that for approximately 505,000 smokers, there will be approximately 202,000 quit attempts per year. This roughly translates to 40% of current smoking class

members, for any given year of the program. After deriving the approximate number of class members who will attempt to quit, the Plaintiff Class then derives the utilization of each component by class members who actually manifest their desire to participate in the program by utilizing one or more of the components provided. For example, the utilization of gum and patches (also referred to as "nicotine replacement therapy" or "NRTs") is, according to Plaintiffs, 30% of the 40% of those who will try to quit,[73] which is 12% of all smokers. The utilization of "intensive cessation programs" (*i.e.* intensive counseling and/or group therapy) is, according to Plaintiffs, 10% of the 40% of those who will try to quit,[74] which is 4% of all smokers.

The data presented by Defendants, though often framed in different terms, was essentially very similar. Defendants, for example, relied on a study which concluded that 2.9% of smokers underwent counseling, 11.7% of smokers used nicotine-replacement therapies, and 2.2% of smokers used both counseling and NRTs.[75] Defendants also relied

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[73] *See, e.g.*, Transcript, pp. 25092-25093 (experience in California was that 10.7% used gum and 5.4% used patches when paying for the aids, which, based on experience in Massachusetts and New York would double if paid in full by the fund); Transcript, pp. 27438-27439, Ex. 981.04 at p. 57 (in Massachusetts, 30% of the smokers trying to quit used some form of NRTs).

[74] *See, e.g.*, Transcript, p. 27439, Ex. 981.04 at p. 57 (in Massachusetts, 9% of smokers trying to quit enrolled in a formal "quit-smoking program").

[75] Transcript, pp. 26543-26545; Ex. SA-5165 at p. 307.

heavily upon the "PACT Guide"[76] – a publication which advocates payment for health system intervention by primary care physicians with respect to smoking-cessation, and provides advice on how physicians can be reimbursed by insurance companies, HMOs, or other payers for providing such services to their patients. In the PACT Guide, the authors note that, in the experience of the Group Health Cooperative of Puget Sound, which made forms of cessation treatment available to its members, only 10% of smokers, (although the guide arguably refers to 10% of all plan *members* – which would be around 50% of smokers), participate.[77] The Defendants relied on a third article which indicated that 10% of smokers would participate in a formal program.[78]

With respect to health system intervention by primary care physicians, the Plaintiffs' experts determined that approximately 53% of smokers trying to quit (or approximately 21.2% of all smokers) would be treated by primary care physicians who would take the time to consult with them about smoking cessation for an amount of time, the cost of which would average out to $100/year.[79]

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[76] Ex. SA-5366.

[77] Transcript, p. 27336; Ex. SA-5366.

[78] Transcript, p. 27405; Ex. 1214.04.

[79] As explained by Dr. Burns: "70 percent of smokers see a physician in a given year. So that gives us 154,000 smokers. Next, of those smokers, we know that in Louisiana about a little more than sixty-some-odd, 65 or 68 percent are currently counseled. We think that a higher number, 75 percent, can be achieved through this program. Seventy-five percent is the number that has been achieved in Rhode Island where

Although this type of health system intervention (component 3) was clearly distinct from participation in an intensive group or other counseling program (component 4), Defendants' cross-examination on this issue revolved primarily around the relatively low rates of participation in intensive programs. With respect to the component at issue, (*i.e.* "health system intervention"), Defendants' experts admitted that such intervention by a primary care physician was effective,[80] and that over 70% of smokers visited a primary care physician over the course of a year.[81]

Defendants challenged Plaintiffs' initial premise that approximately 40% of smokers would attempt to quit within a given year, (which, again, is more accurately described as a measure of likely *quit attempts*, not a number of smokers), but the 1998-1999 Current Population Survey for the State of Louisiana reflected that 32.4% of smokers were attempting to quit annually (*without* a comprehensive smoking-cessation program);[82] the 2000 Louisiana Annual Tobacco Report indicated that approximately 53% of Louisiana smokers had

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organized programs to deal with physician advice has been conducted. Of those 75 percent counseled, we have 70 percent seeing a physician. And of that 70 percent, 75 percent are counseled, 40 percent will attempt to quit. This, again, is a conservative assumption .... Because it's likely that physician counseling will increase the number of people who are trying to quit. But to be conservative, we're using the same 40% that we used for the rest of the population." Transcript, pp. 25103-25104.

80 Transcript, pp. 26613-26615, 26622-26625, 26633-26635.

81 Transcript, p. 26645.

82 Transcript, pp. 25064-25065.

made quit attempts within the year;[83] the California program achieved an annual rate of 40.3%;[84] the 1999-2001 data from the Massachusetts experience indicated that 46% did utilize one or more of the forms of assistance offered;[85] and, the 2001 Surgeon General's Report indicated that smokers often forget short-term quit attempts, which are generally under-reported.[86]

The jury, apparently, accepted the Plaintiff Class' evidence with respect to anticipated utilization by class members,[87] and, based on the preponderance of the evidence, the Court agrees.

Cost Bases

The Defendants did not seriously challenge any of the underlying costs of the components, with the exception of health system intervention (component 3) and marketing and education (component 7).[88] According to the Plaintiffs' experts, the costs of paying primary care physicians to counsel the smoker, recording the information on the chart, tracking the smoker, and follow-up, will cost around $100 per quit attempt.[89] The defense experts

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83 Transcript, pp. 25552-25553; Ex. AZS-000653.

84 Transcript, p. 25065.

85 Transcript, pp. 27438; Ex. 981.04 at p. 57.

86 Transcript, pp. 27711-27712; Ex. 472.02 at p. 96.

87 *See* Phase II Special Verdict Findings, Section III, Question 3.

88 The Defendants also challenged this component on First Amendment and Federal Preemption grounds, (discussed *infra*).

89 Transcript, p. 25104.

pointed to a reference in the PACT Guide that some form of primary care intervention might cost only $1 or $2 per visit.[90] However, Dr. Nassetta admitted on cross-examination that eight to twenty minutes of counseling per patient would be appropriate, and that it would not be reasonable to pay a physician only $1 or $2 for that amount of counseling.[91] Dr. House admitted, on cross-examination, that the PACT Guide prices "minimal counseling" of less than three minutes at $33.20, counseling of three to ten minutes at $56.48, and "full counseling" at $94.24.[92]

The marketing and advertising budget (component 7) was derived from a recommended budget for "tobacco control" (discussed more fully *infra*), which would also include messages regarding youth prevention, environmental tobacco smoke, and use of cigars, pipes, and smokeless tobacco, (in addition to information and encouragement regarding cessation). Dr. Connolly, however, explained that, irrespective of the message (or messages), in order to effectively reach a given population, you must budget and pay for marketing that will have the necessary and appropriate "reach".[93] Plaintiffs' experts also testified regarding the importance of marketing and education to not only provide information regarding cessation services, but also to motivate and re-encourage smokers in their quitting efforts. Finally, Plaintiffs

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[90] Transcript, p. 26631.

[91] Transcript, pp. 26623, 26633-26634.

[92] Transcript, p. 27393.

[93] Transcript, pp. 25719-25722. *See also*, Transcript, pp. 25116-25117, 25136 (Burns).

noted that Defendants, for example, spent over $150 Million in the advertising and promotion of cigarettes in Louisiana in 2001.[94]

The Defendants specifically admitted that a 5% factor for administration was appropriate.[95]

The jury, apparently, accepted the Plaintiff Class' evidence with respect to the costs of the components,[96] and, based on the preponderance of the evidence, the Court agrees.

Defendants' Funding Obligation

The jury determined that Defendants were responsible for $591,342,476.55, to be used to fund the twelve components, plus administration,[97] for a period of ten years.

Based on the language in *Bourgeois*, the inherently equitable nature of these proceedings, and the nature of the relief provided to the class, the jury's determination, in the Court's opinion, should not be treated as an "award" of future medical "damages" as one would find in a traditional tort suit.

The jury heard testimony from both Dr. Rosen and Dr. House regarding the present valuation of monies necessary to fund the court-supervised program in years to come. Dr. Rosen explained that, while inflation for some of the components would

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[94] Ex. 0539.04.

[95] Transcript, p. 28027.

[96] *See* Phase II Special Verdict Findings, Section III, Question 3.

[97] The Defendants admitted that a 5% factor for administration was appropriate. Transcript, p. 28027.

likely continue at the general 4% rate, the costs of healthcare has and will likely continue to increase by as much as 6-to-7% annually.[98] Dr. Rosen projected, therefore, that, over the course of the entire program, the "present value" would actually be a little more that then costs as projected by Dr. Burns and Dr. Connolly.[99] The jury did not attempt to reduce the cost estimates proposed by Plaintiffs,[100] and therefore must have determined that any interest earned will be offset by inflation.

In any event, based on the evidence, based on the law, and based on equitable considerations, I believe it is appropriate for the Defendants to deposit the $591,342,476.55 recommended by the jury, plus judicial interest, into the Registry of the Civil District Court to be held in trust for the benefit of the Plaintiff Class, as set forth in the Judgment.

Because the Jury determined in Phase I that Defendants had conspired with one another to commit willful and intentional acts,[101] this obligation is a solidary obligation. La. Civ. Code art. 2324(A).

"Tobacco Control"

Smoking cessation programs and services for adults are part of a larger body of public health efforts commonly referred to as "tobacco control." Tobacco control efforts include not only programs to

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98 Transcript, pp. 26212-26213, 26229.

99 Transcript, pp. 26215-26216.

100 *See* Phase II Special Verdict Findings, Section III, Question 3.

101 Phase I Special Verdict Findings Nos. 18, 31-35.

help smokers quit, but also to prevent youth smoking and other initiation, to reduce environmental tobacco smoke ("ETS"), to influence pricing by increasing taxes, and to reduce use of smokeless tobacco, pipes, and cigars. Throughout the course of the trial, parties distinguished cessation programs and aids from other non-cessation-related tobacco control efforts, and, where possible, tobacco control evidence unrelated to cessation was excluded.[102] The jury

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[102] *See, e.g.*, Transcript, pp. 24916-24917 (Dr. Burns: "Tobacco control is the whole ball of wax. It's the large task of dealing with all aspects of tobacco. It includes preventing kids from starting, it includes regulating tobacco as a product, it includes preventing people from various other exposures to smoke.... And so it's a responsibility that covers all aspects of tobacco. That is, smokeless tobacco as well as cigarettes, the chewing tobacco.... The program that we are proposing is the component of a comprehensive tobacco control program that deals with cessation. In order to deal with cessation, you need a comprehensive cessation program. But that's different from the tasks that you would take on if you were dealing with all of tobacco control"); Transcript, p. 25016 (Burns) (CDC provides recommendations for all areas of tobacco control, "but we are going to focus on those aspects of it that relate to cessation"); Transcript pp. 25392-25393 (Burns) (CDC Best Practices tobacco control programs relating to initiation not part of program; limited to cessation); Transcript, pp. 25139-25140 (Burns) (five percent for administration applied to cessation, as distinguished from tobacco control); Transcript, p. 25574 (Burns) (only used portion of tobacco control recommendations that applied specifically to cessation); Transcript, p. 25781 (Dr. Connolly) (the *Scott* program is limited to only cessation); Transcript, p. 25785 (Connolly) (tobacco control elements have been stripped out, with program limited to cessation); Transcript, p. 25870 (Connolly) (drawing distinction between effectiveness of overall tobacco control program and the "cessation component"); Transcript pp. 25927-25931 (Dr. Moody-Thomas) (not dealing with keeping children from

was instructed that the only services and aids at issue were those related to cessation,[103] and the Court finds, by a preponderance of the evidence, that the components and costs presented by the Plaintiff Class, and found by the jury, are related to smoking cessation, and not other elements of tobacco control.

First Amendment and Preemption Issues Relating to Marketing and Education

Defendants repeatedly argued that marketing and education of class members was barred by the First Amendment and/or Preempted by the Federal Cigarette Labeling and Advertising Act of 1969. Defendants, however, admitted during their Phase II opening statement that an advertising or marketing component of the program is appropriate.[104]

Neither the program, generally, nor the marketing and educational elements of the program, in particular, prohibit the Defendants from engaging in political expression, commercial speech, or curtail the advertising or promotion of their products in any way. Nor are Defendants' future advertising and/or

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smoking or other tobacco control, but only with cessation programs or services).

103 Transcript, p. 28077.

104 "There should be advertising when the program starts. At the beginning of the program, yes, you need to tell class members so that they know what's available. No fight there. The Court.... Will make sure that eligible class members who desire to participate in a program are informed, fully informed of what's available, the programs and the resources they can have. This is going to be done by television ads maybe, by newspapers, by the internet, by the radio, and by whatever other methods that's necessary to communicate with the people." Transcript, pp. 24861-24862.

promotional expenditures in Louisiana in any way tethered to the marketing and educational component of the cessation program. Nor do they obligate Defendants to contribute additional funds based on their own advertising or promotional efforts. Nor do they compel the defendants to communicate any particular message to the public or the members of the class.[105] Therefore, the Court does not envision any way in which Defendants' First Amendment rights are in any way curtailed.

With respect to the issue of preemption, the Plaintiffs draw a distinction between marketing and educational content (not yet developed or approved) relating to the benefits and opportunities of cessation services, versus the dangers and hazards of smoking. The Plaintiffs, further, have taken the position that even messages regarding the dangers associated with smoking are not preempted, because: (a) they are intended, not as an additional "warning" in the product liability sense, but to remedy the Defendants' fraud on the Plaintiffs Class, which falls beyond the scope of preemption under *Cipollone*;[106] and/or, (b) the advertisements are not

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105 The Court finds it curious that Defendants, who have admitted in these proceedings that nicotine is "addictive" and who have suggested on their websites that smokers obtain information about cessation services and recommended assistance in quitting, take the position that they are being "compelled" to express views which they do not "endorse or agree with".

106 *Cipollone v. Liggett Group*, 505 U.S. 504, 528-529, 112 S.Ct. 2608, 2623-2624, 120 L.Ed.2d 407 (1992) (distinguishing between a failure-to-warn claim which sounds in product liability law, and a fraud claim, which arises from "a more general obligation – the duty not to deceive").

"requirements" imposed upon Defendants by the State, but rather, the independent activities of a court-supervised trust fund.

In the Court's view, any determination regarding the preemption, if any, of messages that might be communicated to the class regarding the cessation program are premature, until the specific content of those messages has been formulated and approved. The Court rejects the notion that *any* messages regarding the cessation program or the benefits of quitting is preempted.

"Common Damages"

In a Motion for Directed Verdict filed by Defendants during Phase II, and in a subsequent Motion to Decertify filed at the conclusion of the Phase II Trial, Defendants have made the argument that the Plaintiffs failed to prove, and the jury failed to award, "common damages" within the meaning of former Article 593.1.

In the Court's view, a classwide court-supervised trust fund for the establishment and implementation of a smoking cessation program is, by definition, an "item of damage common to the class" as a whole.[107]

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[107] The Court is also of the opinion that the use of the term "common damages" in former Louisiana Code of Civil Procedure Article 593.1(C)(2) and (C)(3) is a legal term of art which refers to the nature of the *remedy* being adjudicated in suggested phases of a class action trial. The term "common" is not necessarily synonymous with "commonality" in the traditional class action context, nor within the "common character" requirement of former Article 591. Indeed, there is no requirement that damages be "common". *Bartlett v. Browning-Ferris*, 759 So.2d 755, 756 (La. 1999); *citing*, *McCastle v. Rollins*, 456 So.2d 612, 620 (La. 1984); *State ex rel. Guste v. GM*, 370 So.2d 477, 489 (La. 1978); *see also*, La. Code Civ. Pro. Art. 593.1(C)(4)(1984) (repealed).

Nevertheless, and in any event, "damage" common to the class – *i.e.*, the *increased risk* to classmembers and the *need* for smoking cessation – had already been established in Phase I.[108] Such findings were supported by the testimony of the experts who agreed that "smokers" as that term is commonly used are at a significantly increased risk,[109] and that cessation treatment should be offered to all smokers who desire to avail themselves of such assistance. Defendants' own Phase I addiction expert, Dr. Rowell, testified, for example, that the class members who are still smoking are the ones who have a moderate to severe dependency and

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[108] Phase I Special Verdict Finding No. 10 (nicotine is a substantial factor in causing people to continue smoking); Phase I Special Verdict Finding No. 17 (defendants intended addiction, which exposed smokers to hazardous substances); Phase I Special Verdict Finding Nos. 29, 30, 34, 36, 38 (Defendants' conduct caused or contributed to the need for cessation); Phase I Special Jury Finding No. 52 (as a direct result of using defendants' cigarettes, "the class suffers a significantly increased risk of contracting" lung cancer, bladder cancer, chronic obstructive pulmonary disease, and cardiovascular disease); Phase I Special Verdict Finding No. 61 (smoking cessation aides exist that will help smokers); Phase I Special Verdict Finding No. 62 (such aides have been prescribed by a qualified physician); Phase I Special Verdict Finding No. 63 (smoking cessation aides are reasonably necessary according to scientific principles); Phase I Special Verdict No. 64 (clinical value to cessation methods or aides). *See* also, Phase II Special Verdict Finding No. 1 (eligible class members should be able to participate in one or more components of a smoking cessation program).

[109] Burns Testimony, pp. 11427, 11721-11725; Emery Testimony, pp. 16888; Lavie Testimony pp. 16195-16196, 16199; Sartor Testimony, pp. 16359, 16402, 16404, 16425.

are in the most need of help in quitting.[110] Defendants' Phase II expert, Dr. Nassetta, similarly testified that cessation assistance would be appropriate for any smoker seeking assistance to stop smoking.[111]

The evidence presented, moreover, was that an integrated, comprehensive, "common" program was appropriate, desirable, and reasonably necessary in accordance with contemporary medical and scientific principles,[112] and includes several components which are unitary in nature, and unquestionably established for the benefit of the class as a whole.[113]

III. OTHER ISSUES

A. Eligibility

The evidence presented during the Phase II Trial clearly establishes that the eligibility of class members to receive benefits from or otherwise participate in the court-supervised cessation program can and should be determined by qualified health care providers who are involved with the program. First, it is important to recognize that a person who does not need or want smoking cessation assistance is extremely unlikely to attempt to

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[110] Transcript, p. 14922.

[111] Transcript, p. 26625.

[112] Transcript, pp. 25061-25062, 25444, 25610, 25612, 25680, 25694-25695, 25772, 26272. *See also*, Transcript, p. 26460, 26679 (Nassetta).

[113] *See, e.g.*, Transcript, pp. 25532-25542, 26272; Phase II Special Verdict Findings, Section III, No. 3, Components 5-12, and Section IV, Nos. 4 and 5.

participate in a smoking cessation program.[114] In addition, the physicians who testified in Phase Two indicated that objective indicia of eligibility can and should be made in the same way that routine medical histories are taken.[115]

Such a procedure is consistent with other medical monitoring cases. *See, e.g., Petito v. A.H. Robins*, 750 So.2d 103, 107 (Fla. App. 3 Dist. 1999), *review denied*, 780 So.2d 912 (Fla. 2001); *Day v. NLO, Inc.*, 851 F.Supp. 869, 885-887 (S.D. Ohio 1994).

Such a procedure is consistent with the administration of welfare benefits plan under ERISA, 29 U.S.C. §§ 1001, *et seq. Pegram v. Herdrich*, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) (recognizing the practice of Plan Administrators making "mixed" determinations of

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[114] *See, e.g.*, Transcript, pp. 26074-26076 (Defense Counsel: "Nobody is going to show up for smoking cessation services unless they want to get them right?" ... Dr. Moody-Thomas: "They can need them, but they won't necessarily avail themselves of them").

[115] Transcript, pp. 25032-25033 (Burns) ("no difficulty in having the people who do the interaction with the patient ask the questions necessary to define when they smoked, whether they are a resident of Louisiana, and what brands they smoked"); pp. 25616-25617 (Connolly) (you can tell when you look in a patient's mouth whether he or she is a smoker); p. 26587, 26592-26594, 26613-26615 (Nassetta) (the standard of care is to record smoking history in a patient's record, and it is sometimes even incorporated into the form); p. 27084 (Kaplan) (if a smoker came into his office and said "I want to quit smoking. I want a plan," he would encourage the patient to use these resources).

eligibility and treatment through treating physicians).[116]

And such a procedure is consistent with the allocation and disbursement of relief in class actions generally. NEWBERG & CONTE, *Newberg on Class Actions* (3rd ed. 1992) §§ 4.26, 10.12;[117] La. Code Civ. Pro. Art. 593.1 (1984) (repealed); *Triche v. E.I. duPont*, 98-1019 (La. App. 5 Cir. 3/30/99), 734 So.2d 1231, *writ denied*, 99-1198 (La. 6/4/99), 744 So.2d 632.[118]

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116 *See also*; *Borst v. Chevron*, 36 F.3d 1308, 1323-1324 (5th Cir. 1994) (no right to jury trial in claim for benefits by ERISA participant or beneficiary).

117 Following common proof of damages suffered by the class, "the total recovery will then be allocated to individual members, a process that may be accomplished by various means, such as: use of proof of claim procedure; use of average damages formula on a per capita basis; individual allocations without proofs of claim when appropriate records or information is available; or use of a cy pres distribution. If common proof of aggregate damages is permitted by the court, the defendant may be entitled to a jury trial for such common proof. Once the defendant's total damages liability has been determined, then the allocation of that aggregate sum among class members is an internal class action accounting question." *Newberg*, § 4.26. "Individual claims may be processed by a special master or by a committee of counsel appointed by the court. The drain on judicial resources is thus reduced, and *the processing of claims may be simplified because the lesser standard of proof may be applied without jeopardizing defendant's due process rights, the defendant having been given the full opportunity to challenge damages on a class basis at trial.*" *Newberg*, § 10.12, (emphasis supplied).

118 "The trial court is given broad discretion in matters which affect the general order of proceedings in class actions" and approving a proof of claims process by a neutral agency with representatives from each party present to oversee the process.

As noted *supra*, the establishment and administration of a court-supervised medical monitoring and/or cessation program is equitable or injunctive in nature, for which a jury is not required. La. Code Civ. Pro. Art. 1732(3).

Moreover, the evidence presented during Phase II establishes that the average cost of cessation for an individual smoker is $3,779, which is *less* than the total amount sought, or awarded, per participating classmember under the current program.[119] Therefore, the amount in controversy for each class member is less than $50,000, making an "individualized" jury trial on the issue of eligibility inappropriate under La. Code Civ. Pro. art. 1732(1).[120]

B. An Individualized Determination of "Addiction" Is Not Required

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Triche, 734 So.2d at 1231; *see also*, *Bourgeois*, 716 So.2d at 362 n. 16 (trial courts are free to develop procedures for the establishment and administration of a medical monitoring program, as appropriate).

119 Transcript, pp. 25572-25573. (*See also*, Ex. 7373; Transcript, pp. 25198-25201).

120 It should also be noted that the statutory right to a jury trial in Louisiana derives not from the U.S. Constitution, (*see Parker v. Rowan*, 599 So.2d 296, 301 (La. 1992), *cert denied*, 506 U.S. 871 (1992)), nor the Louisiana Constitution, but from the Louisiana Code of Civil Procedure, which provides that: "The articles of the Code of Civil Procedure are to be construed liberally, with due regard for the fact that they implement the substantive laws and are not an end in themselves." La. Code Civ. Pro. Art. 5051. *See also*, *Bouregois*, 716 So.2d at 362 n. 16 (trial courts are free to develop procedures for the establishment and administration of a medical monitoring program, as appropriate).

Dr. Burns testified in Phase II that cessation is recommended for all smokers, whether "dependent", "addicted", or "habituated", and that anyone who stopped smoking would benefit from cessation, whether "addicted" or not.[121]

Neither Civil Code Article 4, Civil Code Article 2315, amended Civil Code Article 2315, the Louisiana Code of Civil Procedure, the Louisiana Constitution, the U.S. Constitution, the *Scott* class definition, *Bourgeois*, or any other authority requires that, in order to participate in a medical monitoring and/or cessation program, the plaintiff must first prove that he or she is "addicted" to something.

As a practical matter, moreover, no class member or other person who is not dependent on cigarettes is likely to consider availing himself or herself of a smoking cessation program. Therefore, as a matter of "due process" for *res judicata* purposes, the only people who will seek to participate in the program will, of necessity: (a) desire to participate, and (b) be "addicted" to, "dependent" upon, or otherwise suffering from difficulty in quitting the "habit" of smoking.[122]

C. Causation or "Reliance" Has Been Determined on a Classwide Basis

The certified claim tried to the jury in Phases I and II was one for a single, common, unitary,

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121 Transcript, pp. 25033, 25237. *See also, e.g.*, Nassetta Testimony, Transcript, p. 26625.

122 *See, e.g.*, Transcript, pp. 26074-26076 (Defense Counsel: "Nobody is going to show up for smoking cessation services unless they want to get them right?" ... Dr. Moody-Thomas: "They can need them, but they won't necessarily avail themselves of them").

equitable, court-supervised fund for the class as a whole. Therefore, the only question of "reliance," (if any), was a question as to the reliance of a class as a whole. If and when individual class members assert individualized claims for traditional money damages, then there may be a requirement for those class members to establish individualized reliance at that time. But, individual reliance is not an issue in these proceedings.

The jury found class-wide "reliance". Specifically, the jury determined that there was "detrimental reliance" on the distorted knowledge concerning smoking and health by an intended and foreseeable class of Louisiana citizens, there was "detrimental reliance" on the distorted knowledge concerning the properties of nicotine and that such reliance was "reasonable".[123]

This trial Court distinguishes the present case from *Banks*.[124] The *Banks* case involved a one-time purchase of an insurance policy in "reliance" upon the representations of insurance agents or misleading illustrations. The fraud in *Banks* was not a fraud of omission, but fraud by affirmative

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[123] Phase I Special Verdict Findings Nos. 25-30. *See also*, Phase I Special Verdict Findings Nos. 32, 34, 65.

[124] *Banks v. New York Life*, No. 98-0551 (La. 7/2/99), 737 So.2d 1275. The Court notes that the application of *Banks* to the present case has been at least implicitly if not expressly rejected by the Courts of Appeal and Supreme Court on at least three prior occasions. Judgment, Dec. 22, 2000, *writs denied*, No. 2001-0227 (La. App. 4th Cir. 4/3/01), *writs denied*, No. 2001-1107 (La. 5/11/01), 792 So.2d 740; *Scott v. American Tobacco*, 2002-2449 (La. 11/15/02), 830 So.2d 294; and, Trial Order No. 10, *writ denied*, 2003-1872 (La. App. 4 Cir. 12/5/03), *writ denied*, No. 2004-0008 (La. 12/13/04), 867 So.2d 691.

misrepresentation. The representations made in *Banks* were non-uniform, and varied among the 1,000-plus agents. And the fraud in *Banks* was accomplished through direct, rather than indirect, channels of communication.[125] In this case, the Phase I trial record revealed an enormous effort lasting five decades involving primarily fraud of suppression, concealment and omission. The Phase I trial evidence revealed that the fraudulent scheme was targeted at a large portion of the American public and such fraud was designed to distort the entire body of public knowledge rather than to individually mislead millions of individual class members. And, indirect channels of communication were used by these defendants. The Phase I trial evidence revealed a five decade long public relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though the defendants knew that such an impression was false. The trial record reveals that the defendants sought to create doubt about the connection between smoking and disease so that smokers would have something to justify beginning or continuing to smoke. In effect these defendants manipulated the thinking of their targets. Other courts who have reviewed this same evidence have also found and held that where a defendants' lengthy course of prohibitive conduct affects a large number of consumers, like the class of Louisiana smokers, and the defendants use indirect communications designed to distort the entire body of public knowledge, the showing of reliance that must be made to prove a causal connection between smoking and the class' reliance on communications

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125 *See generally*: *Banks*, 737 So.2d at 1281-1282.

from the defendants need not include direct evidence of reliance by individual consumers of the defendants' cigarettes. Rather, the causal connection may be established by other direct or circumstantial evidence that a court determines is relevant and probative as to the relationship between the class claim and the prohibited conduct. *See, e.g.*, NEWBERG & CONTE, *Newberg On Class Actions*, (3rd Ed 1992) § 4.26.

Judge Weinstein of the United States District Court for the Eastern District of New York in *Falise v. American Tobacco Company*, 94 F.Supp.2d 316, 335 (E.D. NY 2000), said it best when he wrote:

> Where... the fraudulent scheme is targeted broadly at a large proportion of the American public the requisite showing of reliance is less demanding. Such sophisticated, broad-based fraudulent schemes by their very nature are likely to be designed to distort the entire body of public knowledge rather than to individually mislead millions of people. From the perspective of the fraudulent actors, clear efficiencies are gained by co-opting the media and other outlets of information as unwitting tools for the pervasive scheme. If plaintiffs allegations are borne out, it was crucial to the success of Tobacco's scheme – particularly the public's willingness to accept the misrepresentations – that "big lies" about... nicotine's addictiveness, and the inability to produce a safe cigarette appear to come not from the Tobacco entities themselves, but rather to appear as facts – or at least open questions – permeating the entire boy of public knowledge. To require reliance on specific misrepresentations where

> indirect channels of communication were integral to the success of the scheme would produce the perverse result of having the most massive and sinister fraudulent schemes be the ones that must escape... liability.

The trial Court agrees with Judge Weinstein and the courts of other jurisdictions who have addressed this issue.[126] Individual reliance is not an issue. The Phase I jury determined all issues of causation and reliance on a class-wide basis.

D. The Court-Supervised Cessation Program Fits Within Bourgeois

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126 *See, e.g., Group Health Plan, Inc. v. Philip Morris*, 621 N.W.2d 2, 14 (Minn. 2001) ("In cases such as this, where the plaintiffs' damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of defendants' products. Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that the district court determines is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct"); *Williams v. Philip Morris*, 48 P.3d 824, 830-831 (Oregon App. 2002), *review denied*, 61 P.3d 938 (Ore. 2002), *vacated, on other grounds*, No. 02-1553 (Oct. 6, 2003) ("In contrast to most fraud cases, plaintiff does not rely on one or a few fraudulent statements made to one or a few identifiable individuals. Rather, her theory is that defendant, in concert with other tobacco companies, engaged in a decade-long public-relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though the defendant knew that such an impression was false. According to plaintiff's evidence, defendant sought to create enough doubt about the connection between smoking and disease that potential and actual smokers would have something to which they could point to justify beginning or continuing to smoke").

Defendants contend that cessation is "treatment" for the "injury" of "addiction" and therefore a court-supervised cessation program does not fit within *Bourgeois*. However, the Courts have already concluded that a medical monitoring *and/or cessation* program fits within *Bourgeois* as a certified claim, as the law of this case. *See Scott, supra*, 725 So.2d at 17 ("The program for medical monitoring should include not only a plan for monitoring the effects of nicotine in causing serious diseases but should also be designed to assist addicted smokers in cessation of smoking because it is fundamentally necessary where the product contains a substance, nicotine, which causes dependency"), *writ denied*, 731 So.2d 189 (La. 1999); *see also, Scott*, 2002-2449 at p. 5, 830 So.2d at 297.

Moreover, the testimony admitted in Phase II establishes that cessation is primarily intended to *remove exposure to harmful toxins* and to *prevent* the development of more serious conditions, such as lung cancer, bladder cancer, COPD, and heart disease.[127]

E. LPLA

The exclusivity provision of the LPLA is limited to situations where the defendants are acting as "*manufacturers*" for damage caused "*by their products*". La. Rev. Stat. 9:2800.52. The defendants, in this case, entered (decades before passage of the LPLA) into a ongoing conspiracy to suppress research, to conceal information, and to otherwise confuse the issue of smoking and health, both individually and through *non-manufacturing* organizations like the Tobacco Institute (a defendant in this case) and the Council for Tobacco Research

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[127] Transcript, pp. 24992, 25226-25227.

(CTR).[128] The cause of action is not directed at Defendants in their capacity as "manufacturers"; their conduct, rather, is part of a much broader effort to deceive the public, the government, and the scientific community – separate and apart from the sale of cigarettes.[129]

Similarly, the manufacturer Defendants are also solidarily liable for the obligations of the Defendant Tobacco Institute, (as well as the Tobacco Industry Research Committee and the Council for Tobacco Research),[130] which is (are) liable for fraud and conspiracy – not as a "manufacturer" liable for damage caused by its (their) "products" within the meaning of the LPLA.

Moreover, while a manufacturer's basic duties under traditional product liability law may have been limited with the passage of the LPLA, the Defendants in this case voluntarily assumed, and continued to assume, *additional duties* to discover and communicate accurate information to the public, and to refrain from marketing their products to children. Certainly, the legislature could not have

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[128] Special Jury Verdict Finding No. 18. *See* also: Special Verdict Findings Nos. 7, 8, 11, 13, 14, 19, 21, 31, 32, 33, 34, 35, 37; and, Report and Recommendation of the Special Master finding a *prima facie* case that Defendants had engaged in a crime or fraud, (cited in the November 2003 *Per Curiam* at p. 10 and attached as Exhibit "C").

[129] *See, for example*: *Cipollone v. Liggett Group*, 505 U.S. 504, 528-529, 112 S.Ct. 2608, 2623-2624, 120 L.E.2d 407 (1992) (distinguishing between a failure-to-warn claim which sounds in product liability law, and a fraud claim, which arises from "a more general obligation – the duty not to deceive").

[130] Phase I Special Verdict Finding No. 18.

intended to immunize a manufacturer from the intentional breach of a duty it had voluntarily assumed.[131]

Finally, the LPLA alters substantive rights, and cannot be applied retroactively.[132]

The Court therefore concludes that the relief to the Plaintiff Class arising from Defendants' intentional conduct – which began before the passage of the LPLA and was continuing until after suit was filed – is not circumscribed or limited by the exclusivity provisions of the LPLA.

F. Representation of the Class

In its decision dated November 15, 2002, the Louisiana Supreme Court instructed that: "Phase I of the trial should be conducted as to determine defendants' liability for establishing a court-supervised medical monitoring and/or cessation program. Such a trial will include the *common* issues of fault and causation, which can be tried on a *class-wide* basis, including the *Bourgeois* factors. During Phase I, defendants will have the opportunity

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131 *See generally*: *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1369 (La. 1984); *Rick v. State DOTD*, 93-1776 (La. 1/14/94), 630 So.2d 1271. *See also*: *Magnus v. Fortune Brands*, 41 F.Supp.2d 217, 222-223 (E.D.N.Y. 1999); *Laborers Local 17 v. Philip Morris*, 7 F.Supp.2d 277, 292-293 (S.D.N.Y. 1998); *citing*, *Cipollone*, 505 U.S. at 525, 112 S.Ct. at 2622 ("the 'requirements' imposed by an express warranty claim are not 'imposed under State Law,' but rather imposed *by the warrantor*"). *See also*: *Cipollone*, 505 U.S. at 530, 112 S.Ct. at 2624-2625 (claims arising from a conspiracy among the defendants to conceal or misrepresent material facts concerning the health risks of smoking are not preempted).

132 *Gilboy v. American Tobacco*, 582 So.2d 1263, 1264 (La. 1991).

to present any applicable *class-wide* affirmative defenses." *Scott*, *supra*, 830 So.2d at 297 (emphasis supplied).[133]

The Courts had already determined that Ms. Scott and Ms. Jackson are adequate class representatives,[134] and the jury determined, in Phase I, that "*the plaintiffs*" have established the right to a court-supervised cessation program.[135]

Defendants have raised, in a post-trial Motion for Decertification, that the Plaintiff Class failed to establish that either Ms. Scott or Ms. Jackson, *individually*, need or desire cessation treatment.

However, the plaintiffs established, during the Phase I trial, that, as of the time suit was filed, Ms. Scott and Ms. Jackson were smokers, and that they were in need of smoking cessation assistance; that, subsequent to the certification of the class, they were prescribed and did participate in a limited cessation program with Dr. LeBlanc; that they struggled with quitting; and that, as of date of their testimony in Phase I, they desired to participate in a program designed to assist members of the class in smoking

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[133] The Louisiana Supreme Court, at least implicitly, also approved of the Phase II Trial Plan, in denying Writ Application No. 2004-0008 (La. 2/13/04), 867 So.2d 691.

[134] *Scott v. American Tobacco Co.*, No. 98-0452 (La. App. 4th Cir. 11/4/98), 725 So.2d 10, *writ denied*, No. 98-3016 (La. 2/26/99), 731 So.2d 189. *See also*, Judgment, Dec. 22, 2000, *writs denied*, No. 2001-0227 (La. App. 4th Cir. 4/3/01), *writs denied*, No. 2001-1107 (La. 5/11/01), 792 So.2d 740, *and*, *Scott v. American Tobacco*, 2002-2449 (La. 11/15/02), 830 So.2d 294.

[135] Phase I Special Verdict Finding Nos. 61-64. *See also*, Trial Order No. 10, p.1.

cessation.[136] *Dr. LeBlanc testified that this experience was* ***common*** *and* ***typical*** *of the experiences shared by members of the Class.*[137]

In addition, the testimony in Phase I and Phase II established that Ms. Scott and Ms. Jackson remain susceptible to relapse.[138]

Nevertheless, it is not Ms. Scott or Ms. Jackson's individual claim(s) for medical monitoring and/or cessation assistance which have been tried to the jury, but rather, the class-wide claims for a single medical monitoring and/or cessation program *on behalf of the class as a whole.* NEWBERG & CONTE, *Newberg on Class Actions* (3rd ed. 1992) § 2.28 (The courts have generally permitted a class representative to continue acting in a representative capacity on behalf of his or her class, as "the claims of absent class members remain viable independently from those of the class representative"); *Penderson v. Louisiana State University*, 213 F.3d 858, 870-871 and 873-874 (5th Cir. 2000) (even where intervening events or circumstances might render moot the individual claims of class representatives, the standing to sue for class-wide remedies remains).

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136 Scott Testimony, pp. 17275-17281; Jackson Testimony, pp. 17448-17454, 17479-17480; LeBlanc Testimony, pp. 17787-17789.

137 Transcript, pp. 17690-17693, 17703-17709, 17712-17713. *See also*, Burns Testimony (Phase II), pp. 24955-24957.

138 *See* Burns Testimony (Phase II), pp. 24957-24958, 24988; Benowitz Testimony (Phase I), pp. 15365-15366, 15371-15372, 15375; LeBlanc Testimony (Phase I), pp. 17700, 17703.

The Court additionally observes, as pointed out by Plaintiffs in their Opposition to Defendants Writ Application to the Louisiana Supreme Court challenging Trial Order No. 10, that, in fact, Defendants did present the jury with specific facts regarding Ms. Scott, Ms. Jackson, and their smoking histories,[139] as well as their class-wide affirmative defenses.[140]

But the question of whether Ms. Scott or Ms. Jackson, individually, will participate in the court-supervised medical monitoring and/or cessation program, like the question of whether Ms. Scott or Ms. Jackson may be entitled to their own individualized award of traditional tort damages, is reserved for another day.

G. Comparative Fault Is Not An Issue

Based upon the Phase I trial record, this Court has determined that the principles of comparative fault do not, and more importantly, should not apply to this case. Applying comparative fault to this intentional act, fraud and conspiracy case would vitiate the very public policy that underlies the doctrine of comparative fault.

The liability trial record reveals 50 years of massive, intentional fraudulent conduct and a conspiracy by the defendants to consciously addict the class of Louisiana smokers and to hide their knowledge that nicotine is addicting for the purpose of maintaining that addiction. The Phase I trial

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139 *See* Opposition to Writ Application No. 2004-CC-8, pp. 7-8.

140 *See, e.g.*, Transcript, pp. 11984-11985 (Burns cross) (Phase I); pp. 13584-13590 (Cummings cross) (Phase I); pp. 18795-18872 (Norrell direct) (Phase I).

record further revealed that the defendants had knowledge 50 years ago, that their products contained cancer-causing chemicals and other substances that caused serious illnesses and diseases that presently lead to the death of 400,000 Americans (including 7,000 Louisiana citizens) each year. The trial record further revealed that the defendants individually, and conspiring among themselves, concealed their knowledge of the effects of smoking their products from the class of Louisiana smokers, and then created a false front, a public relations front (the Tobacco Institute and progeny), to keep the class members smoking by constantly and consistently asserting that any relationship between smoking, disease and death was an "open question," rather than a proven fact. The trial record further revealed that the true purpose of the Tobacco Institute and its progeny was to keep the smoking and health controversy open so that smokers could justify, psychologically, the habit of smoking. The record also revealed that the companies promised through means other than advertising and promotion, that they would investigate the true relationship between cigarettes and disease, and would then reveal the truth to the American public. The jury determined that all of this was false. The Phase I trial record showed, and the jury found, that the defendants committed fraud and intentionally conspired to commit that fraud. The jury found that the defendants consciously desired to promote addiction, knew that addiction was substantially certain to follow, intended to addict smokers to their products which exposed smokers to hazardous substances, intentionally engaged in actions to distort the body of public knowledge concerning nicotine and the relationship between smoking and

disease, intentionally refused to investigate and disclose the facts known to them about the addictive properties of nicotine and the relationship between smoking and disease and intentionally breached their assumed duties not to market their product to the children of Louisiana. The jury also found that the defendants intentionally breached their assumed duties to research the relationship between smoking and disease and their voluntarily assumed duty to tell the truth about what they found. The jury, in summary, found that the defendants' conduct was intentional and fraudulent. The Court agrees.

For a synopsis of the evidence submitted in support of the jury's findings, refer to the Final Report and Recommendations of the Special Master of January 14, 2003, (attached to the November 2003 *Per Curiam* as Exhibit "C"), which sets forth the Special Master's Findings of Fact and Conclusions of Law with respect to whether the crime-fraud exception to the attorney-client and work-product privileges applied to documents claimed to be privileged by the defendants. In the pretrial proceedings, the Special Master held weeks of hearings to assist the Court in determining whether approximately 129 documents were privileged or excepted by the crime-fraud exception to the attorney-client and attorney work-product privilege. The Special Master reviewed the non-privileged documentary evidence and determined that the defendants committed fraud in five areas for purposes of determining whether the crime-fraud exception applied to the claim of privilege. Those areas of fraud are:

1. Fraud relating to the Smoking and Health "controversy";

2. Fraud related to the Tobacco Research Council, Its Successors and Lawyer Involvement;
3. Fraud related to Nicotine as an Addictive Substance;
4. Fraud concerning Low Tar and Nicotine Cigarettes;
5. Fraud relating to the Manipulation of Nicotine

This trial Court adopted the Report and Recommendations, which succinctly sets forth the history behind the intentional conduct and fraud found by the Phase I jury. The Court now adopts the Special Master's Findings of Fact and Conclusions of Law contained in that Report.

The Phase I trial record reveals a thoroughly intentional plan by the defendant cigarette manufacturers to addict the class of Louisiana smokers with substantial certainty that the class of Louisiana smokers would be seriously harmed and that thousands of Louisiana citizens would be subjected to an increased risk of contracting serious latent diseases that lead to death. Louisiana Civil Code Art. 2323(C), in clear and unambiguous terms, provides that where the defendants' conduct is intentional, comparative fault does not apply. Neither *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La. 1985), nor *Veazey v. Elmwood Plantation Associates, Ltd.*, 650 So.2d 712 (La. 1994), holds that comparative fault applies to reduce a plaintiffs recovery where the tortious conduct of the defendant is intentional. The trial record reveals, without any doubt, that the defendants' conduct was intentional and fraudulent. Most of the evidence came from these defendants' secret internal documents.

In addition, analysis under the *Jet Wheel Blast* and *Veazey* rationale require the consideration of important policy issues. The Supreme Court of Louisiana has instructed that the recovery of a plaintiff who has been injured by a defective product should not be reduced in those types of cases in which it does not serve realistically to promote careful product use or where it drastically reduces the manufacturer's incentive to make a safer product. In this case, the application of comparative fault would not be appropriate. Among other things, the harm is not the result of any misuse or abuse of the product by the plaintiffs, but rather from the intentional conduct of the defendants; thus, any incentive to the plaintiffs to stop smoking would be severely compromised, if not eliminated, by the fact that the product is highly addictive and any incentive not to smoke is significantly undercut by the fact that the overwhelming majority of smokers begin smoking when they are children.

Additionally, cigarettes cause damage when used precisely as the defendants intend them to be used. This is not a case where the risk arises from the potential for the plaintiffs to mishandle the product, or fail to use a safety measure or a guard. There is no allegation that the plaintiffs' class misused or abused cigarettes. The plaintiffs' class used the product as intended. The trial Court is of the opinion that the plaintiffs should not be adjudicated in any sense negligent for using a legal product in the precise manner that the defendants intended and desired. The application of comparative fault principles would not promote careful product use.

The Phase I trial evidence also revealed that the defendants kept their knowledge to themselves that nicotine is addictive and that smoking clearly,

without question, causes deadly diseases. The record revealed that defendants not only conspired to keep that information from the class of Louisiana smokers, but consciously and intentionally devised a 50-year scheme to induce smokers to keep smoking by means of promises to investigate the risks of smoking and to tell the truth about those risks. The Phase I trial jury heard evidence that the defendants never intended to tell the truth; rather they created and used the Tobacco Institute and its progeny (the "research" arm of the cigarette industry) simply as a public relations front to hide the truth from this class of Louisiana smokers to keep the smokers smoking. The Phase I trial evidence showed and the jury found that the defendants consciously and intentionally intended to addict the class of Louisiana smokers and to induce them to keep smoking by relying on the manufacturers' assumed duty to investigate the truth about smoking and health and their promise to reveal the truth to the class of Louisiana smokers. The Phase I trial evidence reveals that the defendants intended no such thing. The Phase I liability trial evidence revealed that the defendants' only purpose was to keep the class of smokers smoking. And, the evidence that proved, conclusively, that these defendants had engaged in this fraudulent conduct was hidden for many decades from the public in part by the improper use of the attorney-client privilege. The Special Master's Report of January 14, 2003 sets out the attorney misconduct and attorney manipulation that contributed to the creation and the perpetuation of that fraudulent conduct.

Consequently, the defendants should not benefit from their intentional and fraudulent conduct and

their 50-year old conspiracy confected by the defendants and their lawyers.

Another factor which strongly weighs against the application of comparative fault, is the fact that the defendants' products are addictive. While in theory, the application of comparative fault might serve to promote safe product use (non-use), the reality is that such incentive is severely compromised by the addictive quality of the product. The jury determined that nicotine was a substantial factor in keeping smokers smoking. A reduction of the contributions due and owing to the judicially-established cessation program fund results in no incentive for consumers to "use the product more carefully" (or use it less or not at all). However, particularly given the fact that smokers are addicted to (or dependent or habituated upon) defendants' cigarettes, it is much more likely that the imposition of comparative fault would further contribute to the defendants' refusal to develop safer products for their customers. The Phase I trial evidence revealed support for the proposition that there are safer alternatives available to these manufacturers, alternatives these defendants have not employed in the manufacturing process or attempted to market effectively.

Still other policy considerations weigh against the imposition of comparative fault. The Phase I trial evidence shows that the overwhelming majority of the plaintiffs' class members are addicted to cigarettes while they are still young children. Most smokers begin between the ages of 12 and 17 years of age. While in theory, the application of comparative fault might promote careful product use (or non-use), the reality is that the legal consequences of smoking from a product liability standpoint in the mind of a

child, if existent at all, are distant and remote. The sale of cigarettes to minors is unlawful in the State of Louisiana. Minors do not have the capacity to contract. Consequently, minors should not be held comparatively at fault when they are members of a class protected by the statute and whose actions, even if negligent, fell within the scope of the statute's protection. Applying comparative fault principles to this case, would result in no benefit to the class and would only benefit the defendants.

Still another reason why comparative fault should not apply to this case is the fact that the scope of the defendants' duty did encompass the exact risk of repeated exposure to the product causing an increased risk of harm. In *Veazey*, the Supreme Court of Louisiana established a general rule that an allocation of fault between intentional and negligent tort feasors should generally not be made when the scope of the tort feasor's duty encompasses the risk that the negligent conduct of the other will combine to produce the foreseeable injury or harm. In this case, the jury found that the scope of the defendants' duty clearly encompassed the risk of the occurrence, resulting in the plaintiffs' addiction and increased risk of harm. The application of comparative fault principles based upon the Phase I trial record would reduce the incentive of these manufacturers (and perhaps other manufacturers) to disclose material information and to make the product as safe as they can. Such a result is clearly contrary to the public policy of Louisiana.

The liability trial record in this case also revealed that the defendants' intentional wrongdoing is, was and will always be fundamentally different in nature than plaintiffs' negligence, if any. A true

comparison of fault – between the intentional conduct of a multi-billion dollar corporation with scientists who have complete and total knowledge of their product and hundreds of years of experience and access to state of the art equipment and research versus the negligence or fault of a teenager, or even an unknowledgeable adult smoker who is addicted to a defendant's product, is simply not possible.

Prior to October 1999, the defendant manufacturers consistently misrepresented that cigarettes were not addictive and that the link between smoking and health had not been "proven" and that there was a real "controversy" and therefore an "open question" about the relationship between smoking and diseases. The Phase I trial evidence revealed to the contrary. The defendants knew for at least 50 years that the product was addictive and knew that smoking their product causes deadly diseases. The evidence in this case led the Phase I jury to the findings that defendants' conduct was intentional across the board, and conspiratorial. Accordingly, the defendants should be estopped from making the argument that the public generally, Louisiana smokers in particular, knew or should have know these facts which the defendants have consistently misrepresented to be untrue or unknown. If comparative fault applies, these defendants would profit by their own wrong, a concept repugnant to Louisiana law. *Hyman v. Hibernia Bank and Trust*, 71 So.2d 598 (La. 1916).

Additionally, comparative fault is inapplicable to this equitable claim for the establishment of a unitary, common court-supervised medical monitoring and/or cessation program fund. Louisiana Civil Code Art. 2323 only applies to claims for damages. As the Supreme Court of Louisiana

made clear in *Bourgeois*, an award of "damages" is a monetary award that the plaintiff can spend as he or she sees fit. In this case, by contrast, the only remedy certified for class-wide resolution is relief in the form of a judicially administered cessation program. Therefore, the comparative fault provisions of Louisiana Civil Code Art. 2323(A) do not and should not apply.

The trial record, the jury determination, Louisiana Civil Code Art. 2323, and Louisiana law, policy, and principles of equity militate against comparative fault. Comparative fault should not apply in this case.

H. Consent Is Not Applicable

The defense of "consent" is not applicable to this case. Based on the trial record, consent is vitiated by the defendants' superior knowledge and inducement of the plaintiffs' class members to smoke with the intent and the desire that they become addicted. Notwithstanding, the consent issue was tried to the Phase I jury and rejected.

Additionally, consent is not commonly recognized as a defense to fraud and conspiracy claims. The jury determined that the defendants breached their voluntarily assumed duty not to market their products to children. Louisiana recognizes that minors do not have the ability to consent with fully informed and rational choices. Clearly, the defendants had superior knowledge of the property of their products and intentionally withheld and/or misrepresented that knowledge.

Battery cases such as *Landry v. Bellanger*, 813 So.2d 598 (La. App. 1st Cir. 2002) are not applicable to this case. The Phase I trial evidence revealed that the class of Louisiana smokers used the product as

intended by the manufacturers. Plaintiffs did not use force or threaten force against the defendants or anybody else. The plaintiffs did not provoke the defendants into an altercation, nor otherwise "provoke" the Defendants' conduct toward the class. The evidence revealed that the class of Louisiana smokers simply smoked cigarettes in the way the defendants intended them to be smoked, with assurances by the defendants that the case against cigarettes had not been proven and that cigarettes were not addictive. In this context, there is no legal authority for the proposition that consumers who use a defendant's product as the defendant intended is guilty of an "intentional tort" that would preclude application of Louisiana Civil Code Article 2323(C).

The Phase I jury found, (and based on the evidence, the Court agrees), that the defendants failed to prove that the class knew what the defendants knew, and failed to prove that the plaintiff class knew that the defendants had engaged in fraudulent conduct;[141] consequently, the jury rejected defendants' claim that the class of Louisiana smokers "consented" to the harm.

Where the defendant has superior knowledge and/or induces the plaintiff to act, consent is vitiated. *Fricke v. Owen-Corning*, 571 So.2d 130, 133 n.1 (La. 1990); *citing*, RESTATEMENT (2d) OF TORTS § 892(B)(1965). *See also, Cole v. Department of Public Safety and Corrections*, 825 So.2d 1134 (La. 2002), which stands for the proposition that consent is vitiated where the defendant exerts unnecessary and unanticipated force. In this case, the jury found that the defendants had superior knowledge and induced

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[141] Phase I Special Verdict Finding No. 65.

the class to smoke by means of youth targeting and marketing, and/or nicotine manipulation, with the desire and intent that they become addicted. Consequently, and "consent" by the class would be vitiated by the defendants' counsel.

I. Defendants Exceptions of Prescription Have Been Overruled

Based on the evidence presented and the findings of the jury in Phase I, Defendants exceptions of prescription were overruled. Trial Order No. 10, ¶ IX; *Per Curiam*, pp. 14-15.

The jury determined (and the Court concluded based on the evidence) that the defendants intentionally promoted dependence upon nicotine from at least December 1953 through at least May 24, 1996, when this suit was filed.[142] The jury also determined (and the Court concluded based on the evidence) that the defendants engaged in a fraudulent conspiracy to suppress information and distort the truth from at least January, 1954 through May 24, 1996.[143] This continuing conduct caused or contributed to the plaintiffs' continued smoking, resulting in repeated and continuing exposure to toxic substances, and increased risk of harm.[144]

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[142] Phase I Special Verdict Findings Nos. 15. *See also*, Phase I Special Verdict Findings Nos. 7, 16, 17. *See, e.g.*, Transcript, pp. 14187, 14908-14911, 14947-14948; Ex. 3163.

[143] Phase I Special Verdict Findings Nos. 11, 14, 19, 21, 31, 33, 37.

[144] Phase I Special Verdict Findings Nos. 10, 12, 13, 16, 17, 22-30, 32, 34, 51-54. *See, e.g.*, Transcript, pp. 15421-15437, 15315-15375, 15427-15434, 15437, 14589-14591, 17700-17709; Exs. 2467, 3135, 1096.01.

Consequently, the continuing tort doctrine applies.[145]

The Court also determines that the doctrine of *contra non valentem* applies. Separate and apart from the "discovery rule," the law provides that where, as here, the defendant, through fraud or concealment, attempts to prevent the plaintiff from bringing a cause of action, the issue of whether the cause of action is known or reasonably knowable to the plaintiff is not dispositive. *Plaquemines Parish v. Delta Development*, 502 So.2d 1034, 1056 (La. 1987); *Nathan v. Carter*, 372 So.2d 560, 562, 563 (La. 1979). The jury determined (and the Court concludes based on the evidence) that the defendants engaged in a fraudulent conspiracy to suppress information and distort the truth from at least January, 1954 through May 24, 1996.[146]

Dr. Benowitz, who explained the principles of denial and rationalization as part of smokers' nicotine dependency, explained how, in the mind of an addicted smoker, representations by the defendants that the cause of cancer was an open "controversy" would make it less likely that smokers would quit; and how statements by the CEO of a defendant cigarette manufacturer denying nicotine addiction and comparing smoking to drinking coffee or tea, or eating twinkies, would lull smokers into a feeling of self-blame or self-doubt, and underestimate the increased risk caused by smoking.[147] The

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[145] *Castano v. American Tobacco Co.*, 870 F.Supp. 1425 (E.D. La. 1995).

[146] Phase I Special Verdict Findings Nos. 11, 14, 19, 21, 31, 33, 37.

[147] Transcript, pp. 15427-15434.

omissions and misstatements by the defendants were intended to, and did in fact, give smokers a "psychological crutch", "reassurance" and "self-rationale" to keep on smoking.[148] Dr. Henningfield testified from the U.S. Public Health Service Clinical Practice Guidelines, which provides that "someone's motivation may be influenced by the extent of knowledge they have about what they're exposed to."[149]

Significantly, the evidence establishes that one of the primary motivations behind Defendants' fraudulent conduct, (including document destruction, abuse of the attorney-client privilege, the sanitation of business records, the suppression of scientific or academic studies, use of dummy mailing addresses, shipment of evidence overseas, secret research projects, and the destruction of tests results), was to prevent would-be plaintiffs, such as and including the members of the class, from learning about, brining, and/or succeeding in smoking and health related litigation.[150]

It is also significant to note that Defendants' intentional conduct – not only with respect to fraud and conspiracy, but also with respect to the intentional manipulation of the cigarette to make it more dependence-producing and/or addictive – had a direct and continuing effect on the classmembers

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[148] Transcript, p. 15437; Exs. 2467, 3135.

[149] Transcript, pp. 14589-14591; Ex. 1096.01.

[150] *See generally*, Report and Recommendation of the Special Master Concerning Defendants' Claims of Privilege. *See*, e.g., Exs. 3359.01, 3543, 3151, 3515, 3720, 3010, 3023, 3162, 3459, 3478, 3514, 3546, 3247, 3131, 3585, 3499, 3320; Transcript, pp. 14948-14959; 15659-15675.

own perception about his or her smoking, and therefore the existence of, or desire to pursue, a claim. During the Phase I Trial, for example, Dr. Benowitz explained that exposure to nicotine through smoking actually changes the physical structure of the smoker's brain. These changes have long-term effects which can persist for years. Smokers go through a daily cycle, in which the smoker must become resensitized to the nicotine, every single day. At the same time, the drug itself, and its physical effects on the brain, causes smokers to deny, and rationalize, and underestimate the increased risk caused by smoking, as well as the addictive properties of nicotine.[151]

The Phase I trial evidence showed that the defendants consistently represented, argued and intentionally misrepresented to the American public, the Congress of the United States, Ms. Scott and Ms. Jackson, and the members of the Plaintiff Class, that they did not manipulate nicotine levels, that nicotine was not addictive, and that the relationship between smoking and disease was not proven. "How" the Plaintiffs ask, "can the defendants state, represent, argue, contend, and testify before Congress that they do not manipulate nicotine levels and/or that nicotine is addictive, and then turn around and argue in this proceeding that Ms. Scott or Ms. Jackson or the class as a whole knew or should have known that they were manipulating the levels of nicotine?" The defendants must, in all equity, fairness, and conscience, be estopped from doing so. "If the rule were otherwise, 'the defendants would be

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151 Transcript, pp. 15421-15437, 15315-15375. *See also, e.g.*, LeBlanc Testimony, pp. 17700-17709.

profiting by their own wrong – a thing inadmissible in law.'" *Bunge v. GATX Corporation*, 557 So.2d 1376, 1386 (La. 1990); *Plaquemines Parish*, 502 So.2d at 1056; *Hyman v. Hibernia Bank & Trust*, 139 La. 411, 418, 71 So. 598, 600 (1916).

With respect to the claim of nicotine manipulation, Judge Berrigan observed that:

> Even assuming that the defendants establish as undisputed the fact that the "addiction" or failure to quit smoking resulted in the damages sought be the plaintiffs and that the plaintiffs knew that cigarettes caused "addiction" long ago, the plaintiffs' claims survive because these plaintiffs go to the next step and claim that the defendants' fraudulent concealment and manipulation caused the "addiction". The plaintiffs focus on the *cause* of the inability to quit, not on the fact that they could not or did not quit. As a result, *Perry is not charged with the requisite knowledge when he states that his "addiction" and inability to quit smoking is caused by himself and his own shortcomings rather than by the defendants' alleged concealment and manipulation.*

Castano v. American Tobacco, 961 F.Supp. 953, 959 (E.D.La. 1997) (emphasis supplied). During the Phase I trial, Defendants introduced a considerable amount of evidence regarding the common (or "contructive") knowledge of the ill-effects of tobacco use, going all the way back to the time of King James.[152] However, there was absolutely no

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[152] During Defendants' cross-examination of Dr. Burns, for example, the defendants admitted evidence of the government warnings, the publication of the 1964 Surgeon Genéral's Report, the publication of the *Lawson Haag & Silvette*

evidence that it was publicly known that defendants were intentionally manipulating nicotine delivery in order to create and/or sustain nicotine dependence or addiction, until shortly before the original *Castano* suit was filed, interrupting prescription, in 1994.[153]

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monograph in 1959, the 6,000 studies conducted by the Medical College of Virginia, and a compilation of constituents prepared by Philip Morris in 1963. Transcript, pp. 11984-11985. During the cross-examination of Dr. Cummings, Defendants presented an exhaustive review of the "common knowledge" available from the time of Christopher Columbus. There was evidence from a "counterblast" issued by King James, a quip from Mark Twain, statements by Henry Ford and General Pershing, articles from the *Lancet*, Surgeon General's Reports, and more. Transcript, pp. 13584-13590. During their case-in-chief, Defendants called Dr. Norrell, a historian, who testified on the "public awareness" of smoking. Again, the defendants were not limited to the awareness of Mrs. Scott, Mrs. Jackson, or any other classmember. Defendants, through Dr. Norell, introduced newspaper articles from 1952 including statements by Alton Oschner writings from Christopher Columbus, King James, John Quincy Adams, and Banjamin Rush; textbooks from the 1940s; statements by Thomas Edison and Henry Ford; excerpts from Hunphrey Bogart movies; the *Random House Dictionary of Slang*; CBS news reports; state law prohibitions and federal government warnings; articles from *Life, Reader's Digest, Ebony,* and more. Transcript, pp. 18795-18872.

153 The Court previously rejected Defendants' claim of prescription based on "stacking", in light of the Fourth Circuit's decision in *Smith v. Cutter Biological*, 99-2068 (La. App. 4th Cir. 9/6/00), 70 So.2d 392. In that case, the court held that prescription was interrupted with the filing of the original class action, and commenced to run again when the class was decertified by the court of appeals. Because the plaintiff, in that case, did not file suit within a year of the decertification of the original class action, the case was prescribed. *Smith*, 70 So.2d at 409. Here, by contrast, the *Scott* lawsuit was filed within days of when the original *Castano* class action was decertified by the court of appeals. Therefore, under the *Smith*

Even, therefore, with respect to the "discovery rule", the issue of prescription was appropriately tried, and rejected, on a class-wide bases. *See* Phase I Special Verdict Finding No. 65.[154] *See, e.g., Bratcher v. National Standard Life*, 365 F.3d 408, 420-421 (5th Cir. 2004) (constructive notice in statute of limitations context can be determined on a class-wide basis).[155]

Medical testimony in this case established that a large percentage of people who begin smoking in their youth die from smoking related illnesses and die younger than non-smokers. The evidence also established that stopping smoking adds years to a

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v. Cutter decision, the present lawsuit has not prescribed. While there is some *dicta* which references a public policy that might disfavor the filing of multiple class actions in order to toll, indefinitely, the statute of limitations, that is not what was done in this case. The U.S. Fifth Circuit indicated that, due to complicated choice-of-law issues, a class action challenging nicotine manipulation by the tobacco industry, (which wasn't discovered until 1994), would be more appropriate as a state-wide class action, involving the law and the residents of just one state. *Castano v. American Tobacco*, 84 F.3d 734, 750 (5th Cir. 1996). This Court, the Court of Appeal, and implicitly the Supreme Court, (four times now), agreed. Defendants took writs on the Court's denial of summary judgment, which were denied. No. 2000-2418 (La. App. 4th Cir. 11/28/00), *writ denied*, 2000-3530 (La. 2/16/01), 786 So.2d 103.

154 *See also, e.g.*, Henningfield Testimony, Tr. pp. 14263-14266.

155 *See also*, Transcript, Sept. 18, 2002, pp. 72-73 (Defense Counsel: "Affirmative defenses. They're affirmative defenses in Trial Order 5 that will be tried in Phase I.... There are provisions for letting the jury determine whether these defenses should be available, which, again, is a legal issue, not a fact issue, but *if we're going to try these issues classwide, we can try them that way*. We just need to know") (emphasis supplied).

smoker's life. Cessation of smoking assistance is a proper remedy in this case.

This 30th day of June, 2004, at New Orleans, Louisiana.

Richard J. Ganucheau
RICHARD J. GANUCHEAU
JUDGE, *AD HOC*

APPENDIX I

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 96-8461 **AD HOC DIVISION**

CLASS ACTION CLAIM **JUDGE GANUCHEAU**

GLORIA SCOTT and DEANIA M. JACKSON, on behalf of themselves and all other persons similarly situated

VERSUS

THE AMERICAN TOBACCO COMPANY, INC., et al.

FILED: _____ _____

DEPUTY CLERK

SPECIAL VERDICT

TO THE MEMBERS OF THE JURY:

The written questions you will answer in this special verdict form must be filled out in accordance with the directions contained in this form and the instructions on the law I have given you. When nine jurors agree on the answers to all of the questions in

this form, the Foreperson should sign and date this form and then notify the Court.

I. SMOKING CESSATION ASSISTANCE

1. Should eligible members of the class be able to participate in one or more components of a smoking cessation program?

YES √ NO ___

If YES, continue, if NO, stop here, date and sign the verdict form and inform the court.

II. THE SMOKING CESSATION PLAN PROPOSED BY THE CLASS IN PHASE II

2. Is any component of the program proposed in Phase II reasonably necessary in accordance with contemporary scientific and medical principles?

YES √ NO ___

If YES, continue, if NO, stop here, date and sign the verdict form and inform the court.

III. COMPONENTS, DURATION AND COSTS

3. Which of the following components has the plaintiffs class proven are reasonably necessary in accordance with contemporary scientific and medical principles for the

effective establishment and implementation of a court-supervised and administered cessation program which will assist class members to cease smoking or to prevent relapse:

Component #1. **Reimbursement of Medications**?

YES √ NO ____

1(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

1(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 1(A) above).

Year 1	$14,166,572	Year 2	$13,102,229
Year 3	$12,114,921	Year 4	$11,191,335
Year 5	$10,328,809	Year 6	$9,525,207
Year 7	$8,777,268	Year 8	$8,081,798

Year 9	$7,433,924	Year 10	$6,830,987
Year 11	$ _____	Year 12	$_____
Year 13	$ _____	Year 14	$_____
Year 15	$ _____	Year 16	$_____
Year 17	$ _____	Year 18	$_____
Year 19	$ _____	Year 20	$_____
Year 21	$ _____	Year 22	$_____
Year 23	$ _____	Year 24	$_____
Year 25	$ _____		

Component #2. **Telephone Quitlines?**

YES √ NO ____

2(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

2(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 2(A) above).

Year 1	$4,654,731	Year 2	$4,305,347
Year 3	$3,980,617	Year 4	$3,677,153
Year 5	$3,393,752	Year 6	$3,129,711
Year 7	$2,883,959	Year 8	$2,655,448
Year 9	$2,442,575	Year 10	$2,244,467
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #3. Health Systems Interventions?

YES √ NO _____

3(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

3(B). How much money is necessary to fund this component of the program for each year you have determined this

component is to be included in the program?

(Number of years in 3(A) above).

Year 1	$10,624,929	Year 2	$9,827,422
Year 3	$9,086,190	Year 4	$8,393,501
Year 5	$7,746,607	Year 6	$7,143,905
Year 7	$6,582,951	Year 8	$6,061,349
Year 9	$5,575,443	Year 10	$5,123,240
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #4. **Intensive Cessation Programs?**

YES √ NO _____

4(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the

program.

10 years

4(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 4(A) above).

Year 1	$ 5,565,439	Year 2	$ 5,147,697
Year 3	$ 4,759,433	Year 4	$ 4,396,596
Year 5	$ 4,057,746	Year 6	$ 3,742,046
Year 7	$ 3,448,212	Year 8	$ 3,174,992
Year 9	$ 2,920,470	Year 10	$ 2,683,602
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

If you answered NO to components 1, 2, 3 and 4, stop here, date and sign the form and inform the court. If you answered YES to any component, continue.

Component #5. **Developing Cessation Capacity?**

YES √ NO ____

5(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

5 years

5(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 5(A) above).

Year 1	$ 6,500,000	Year 2	$ 6,500,000
Year 3	$ 6,500,000	Year 4	$ 5,500,000
Year 5	$ 4,500,000	Year 6	$ _____
Year 7	$ _____	Year 8	$ _____

Component #6. **Community Cessation Programs?**

YES √ NO ____

6(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

6(B). How much money is necessary to fund this component of the program for each year you have determine this component is to the included in the program?

(Number of years in 6(A) above).

Year 1	$ 1,000,000	Year 2	$ 1,000,000
Year 3	$ 1,000,000	Year 4	$ 1,000,000
Year 5	$ 1,000,000	Year 6	$ 1,000,000
Year 7	$ 1,000,000	Year 8	$ 1,000,000
Year 9	$ 1,000,000	Year 10	$ 1,000,000
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #7. **Marketing and Education**?

YES __√__ NO _____

7(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

7(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 7(A) above).

Year 1	$13,056,000	Year 2	$ 13,056,000
Year 3	$13,056,000	Year 4	$ 13,056,000
Year 5	$13,056,000	Year 6	$ 13,056,000
Year 7	$13,056,000	Year 8	$ 13,056,000
Year 9	$13,056,000	Year 10	$ 13,056,000
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____

Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #8. **Evaluation of Program Effectiveness?**

YES __√__ NO _____

8(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

8(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 8(A) above).

Year 1	$ 6,212,000	Year 2	$ 6,212,000
Year 3	$ 6,212,000	Year 4	$ 6,212,000
Year 5	$ 6,212,000	Year 6	$ 6,212,000
Year 7	$ 6,212,000	Year 8	$ 6,212,000
Year 9	$ 6,212,000	Year 10	$ 6,212,000
Year 11	$ _____	Year 12	$ _____

Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #9. **Local Centers of Cessation Excellence?**

YES __√__ NO _____

9(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

9(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 9(A) above).

Year 1	$ 4,000,000	Year 2	$ 4,000,000
Year 3	$ 4,000,000	Year 4	$ 4,000,000
Year 5	$ 4,000,000	Year 6	$ 4,000,000

Year 7	$ 4,000,000	Year 8	$ 4,000,000
Year 9	$ 4,000,000	Year 10	$ 4,000,000
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #10. **Development of Program Standards?**

YES __√__ NO _____

10(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

10(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 10(A) above).

Year 1	$ 500,000	Year 2	$ 500,000
Year 3	$ 500,000	Year 4	$ 500,000
Year 5	$ 500,000	Year 6	$ 500,000
Year 7	$ 500,000	Year 8	$ 500,000
Year 9	$ 500,000	Year 10	$ 500,000
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #11. **Monitoring and Auditing?**

YES √ NO _____

11(A). If YES, continue, if NO, go to the next component.

Determine the number of years this component is to be included in the program.

10 years

11(B). How much money is necessary to fund this component of the program for each year you have determined this

component is to be included in the program?

(Number of years in 11(A) above).

Year 1	$ 700,233	Year 2	$ 647,674
Year 3	$ 598,823	Year 4	$ 553,172
Year 5	$ 510,538	Year 6	$ 470,817
Year 7	$ 433,848	Year 8	$ 399,472
Year 9	$ 367,488	Year 10	$ 337,646
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

Component #12. **Training and Technical Assistance**?

YES √ NO _____

12(A). If YES, continue, if NO, go to IV.

Determine the number of years this component is to be included in the program.

10 years

12(B). How much money is necessary to fund this component of the program for each year you have determined this component is to be included in the program?

(Number of years in 12(A) above).

Year 1	$ 3,000,000	Year 2	$ 3,000,000
Year 3	$ 3,000,000	Year 4	$ 3,000,000
Year 5	$ 3,000,000	Year 6	$ 3,000,000
Year 7	$ 3,000,000	Year 8	$ 3,000,000
Year 9	$ 3,000,000	Year 10	$ 3,000,000
Year 11	$ _____	Year 12	$ _____
Year 13	$ _____	Year 14	$ _____
Year 15	$ _____	Year 16	$ _____
Year 17	$ _____	Year 18	$ _____
Year 19	$ _____	Year 20	$ _____
Year 21	$ _____	Year 22	$ _____
Year 23	$ _____	Year 24	$ _____
Year 25	$ _____		

IV. ADMINISTRATION

4. Has the plaintiffs class proven that a percentage of the program's costs should be added and devoted to the administration of the program?

YES __√__ NO _____

5. If the answer to question no. 4 is YES, what percentage of the program's costs should be added as administrative costs?

5%

6. How should the cessation program you have chosen be administered?

Check one:

_____ Through the creation of a central management contractor and staff?

OR

√ Through a third-party administrator?

SIGN AND DATE, THEN NOTIFY THE JUDGE YOU ARE READY TO RETURN TO THE COURTROOM.

Date: 5-21-04 Foreperson: Jacquelyn Beo

APPENDIX J

In the Court of Appeal
Fourth Circuit
State of Louisiana

Docket No. 2003-C-1872

GLORIA SCOTT and DEANIA JACKSON,
on behalf of themselves and
all other persons similarly situated

Plaintiffs-Respondents,
v.

THE AMERICAN TOBACCO COMPANY,
INC., et al

Defendants-Applicants

PER CURIAM

Richard J. Ganucheau, Judge, Ad Hoc
Division
Civil District Court – Parish of Orleans

PER CURIAM

The Phase I Trial in this matter was conducted in accordance with the Supreme Court of Louisiana's Order and Opinion of November 15, 2002. The Phase I trial adjudicated all common issues of liability (fault and causation), including the *Bourgeois* factors, together with all applicable class-wide defenses and affirmative defenses. The jury rendered a Special Verdict in accordance with La. C.C.P. Art. 1812 on July 28, 2003 (see court Exhibit "A," attached). Based upon the factual findings of the jury, and in accordance with *Bourgeois vs. A.P. Green Industries, Inc.*, this Court determines that the class of Louisiana smokers has demonstrated a need for court-administered smoking cessation programs designed to assist the class of Louisiana smokers who desire to quit smoking and to prevent relapse and, consequently, a need for the establishment of a court-administered and supervised trust fund to deliver the program to eligible class members.

This Court, therefore, determined that a Phase II trial is necessary and issued Trial Order No. 10 as the trial plan for the Phase II trial (see court exhibit "B," attached).

The Phase I jury recognized the classes' right to medical monitoring, but determined that the specific tests at issue had not yet gained sufficient support from the medical community. The establishment of the court-supervised medical monitoring and/or cessation program is therefore supported by the jury's findings, but limited, at this point, to cessation. See, *Scott v. American Tobacco Company*,

725 So.2d 10, 17 (La. App. 4th Cir. 11/4/98), *writ denied*, 731 So.2d 189 (La. 1999).

The Phase II trial, in accordance with La. C.C.P. Art. 593.1(c)(2), must therefore (in accordance with the prior applicable La. C.C.P. Art. 593.1) determine all items of damage common to the class and the basis for assessment of those items of damage. Consequently, the Phase II trial will determine the nature, types and components of the cessation of smoking programs, the parameters of such programs, the procedures to be adopted for the establishment, implementation, delivery and administration of such programs, the requirements for eligibility of the class of Louisiana smokers who desire to participate in such programs, the duration of the programs, methods for insertion of these programs into the existing public and private healthcare infrastructure in the State of Louisiana, the cost of the programs and the procedures for the establishment and the administration of the court-supervised fund.

The Court determines that certain issues that were carved out of the Phase I trial by the Supreme Court are now ready for adjudication. In response to the November 15, 2002 Order of the Supreme Court of Louisiana, this Court has determined that the issues of comparative fault and prescription should now be addressed and adjudicated. The Supreme Court further ordered this court to decide issues as they become relevant. In response, this court determines that certain other issues are now relevant for adjudication by this court and the court's above. These issues are also set forth in Trial Order No. 10 and addressed in this per curiam.

Because of the size and complexity of this case, and the near impossibility for a reviewing court to review the enormous record, this court files this *per curiam* opinion to assist the reviewing courts.

The Phase I Trial Record

The Phase I trial adjudicated all common issues of liability, including fault and causation, and all applicable class-wide defenses and affirmative defenses. The reviewing courts now have a complete record to adjudicate the issues that are ready for determination. The reviewing courts should be aware that the trial court and the Special Master heard nearly 200 motions from January, 2001 through January 21, 2003. Additional numerous motions were filed and decided during the trial. The court, before and during this trial (jury selection commenced June 18, 2001, opening statements were delivered on January 21, 2003), heard argument on and ruled upon thousands of pages of deposition testimony and heard argument on and ruled upon the admissibility of thousands of pages of documents, mostly previously secret internal tobacco company documents. At the Phase I liability trial, the trial court and the jury heard from 44 fact and expert witnesses and this court ruled on the admissibility of thousands of additional documents (including documents claimed to be privileged), again mainly previously secret tobacco company internal documents. The record in this case now amounts to almost 30,000 pages.

This court has determined that the issues contained in Trial Order No. 10 addressed in this per curiam are ready for adjudication based upon this now complete liability trial record.

Issues Now Ready for Adjudication

1. Whether comparative negligence is, or should be, applicable to this matter;

2. Issues of prescription;

3. Whether any reliance issues remain to be tried;

4. Whether any issue of consent remains to be tried

The Phase I Liability Issues

After six months of trial at which numerous fact and expert witnesses testified and during which thousands of internal tobacco company documents were admitted and read to the jury, the jury found that the defendants, individually and conspiring with each other, knowingly and deliberately conspired to commit and did commit fraud that spanned five decades directly causing injury to the class of Louisiana smokers. The jury found that these defendants knowingly and deliberately addicted the population of Louisiana smokers to a product known by them to be both addictive and extremely toxic, with full knowledge that over 400,000 Americans (including 7,000 Louisianans) die each year from smoking related illnesses and diseases, illnesses and diseases known to these defendants to be caused by their products for at least 50 years, all the while denying that smoking caused disease and then conspiring to keep the "smoking and health question" open. In short, the jury found that these defendants created a false "controversy" to keep the class of Louisiana smokers smoking, all the while assuring them that they would investigate the relationship between smoking and health and then

would tell the truth about these issues to the class. The jury also found that the defendants' conduct significantly increased the risk of the class to contract four serious latent diseases. The jury found that the defendants' intentionally misrepresented and lied about all of this, thereby subjecting these defendants to liability for the funding of cessation of smoking programs to ameliorate the harm caused by the defendants' actions and their products.

The jury also determined that these defendants intentionally designed their cigarette products for the explicit purpose of creating and perpetuating an addiction to nicotine in order to create a dependence on nicotine that would facilitate the sale of their products thereby reaping profits in the State of Louisiana, all the while denying that nicotine is addictive. The jury further found that these defendants knew that their cigarettes contained nicotine at levels that caused and maintained addiction, consciously desiring to promote addiction, yet failed to tell the truth about what they knew about nicotine as an addictive substance.

The jury found that smoking cigarettes gives rise to significant exposure to substances proven hazardous to human health, determined that the defendants knew that their cigarettes contained substances proven hazardous to human health yet failed to tell the truth about what they knew about their cigarettes, thereby exposing the class of Louisiana smokers to significant levels of substances proven hazardous to human health sufficient to significantly increase the risk of contracting four latent diseases related to cigarettes. In summary, the jury determined that the actions of these

defendants increased the risk of harm to the entire class of Louisiana smokers and determined the remedy to be cessation assistance.

With respect to the plaintiffs' claims of fraud (properly tried in accordance with the Supreme Court's November 15, 2002 Order), the jury found that the defendants intentionally engaged in actions designed to distort the body of public knowledge concerning nicotine and smoking and health, that there was detrimental reliance on that distorted body of knowledge by an intended and foreseeable class of Louisiana citizens, and that the defendants' actions, between January, 1954 and May 24, 1996 (the date the *Scott* petition was filed), were a substantial factor in causing the distortion of the body of public knowledge concerning the properties of nicotine and a substantial factor in causing a distortion of the body of public knowledge concerning smoking and health.

With respect to the plaintiffs' class' claim of conspiracy, the jury found that the tobacco company defendants conspired among themselves and with the Tobacco Institute (the false-front public relations arm of the cigarette manufacturers created to foster the public illusion that the manufacturers were actually researching the truth behind the smoking and health "controversy") to distort the body of public knowledge concerning smoking and health and the properties of nicotine, found that the conspiracy caused or contributed to the need for medical monitoring and cessation of smoking assistance and found that these defendants conspired among themselves to create the idea that there was a real "controversy" about smoking and health issues that

caused or contributed to the need for medical monitoring and cessation of smoking programs.

The jury further determined that the defendants conspired among themselves to refrain from conducting scientific and medical research on the relationship between smoking and disease and that such conspiracy caused or contributed to the need for medical monitoring and cessation of smoking assistance.

This trial court determined and instructed the jury, as a matter of law, based on the Phase I trial record that the defendant manufacturers voluntarily assumed the duty to investigate and then to disclose the true relationship between smoking and disease. On the plaintiffs' claim of breach of those voluntarily assumed duties, the jury found that the defendants intentionally decided not to investigate and disclose the true facts known to them concerning the relationship between smoking and diseases through channels other than advertising and promotion and found that such intentional decisions were a substantial factor in causing the class to smoke and continue to smoke and that their conduct caused or contributed to the need for medical monitoring and cessation of smoking assistance.

This trial court also determined and instructed the jury, as a matter of law, based on the Phase I trial record that the defendant manufacturers assumed a duty not to market their cigarettes to the children of Louisiana. The jury found that the defendants intentionally breached that assumed duty, that such breach caused minors to smoke and was a substantial factor that caused minors to continue to smoke.

The jury likewise found that the cigarettes manufactured and sold in Louisiana by these defendants in the State of Louisiana are hazardous to human health, that such cigarettes significantly exposed smokers to proven hazardous substances, and, as a consequence, the class of Louisiana smokers suffered a significantly increased risk of contracting serious latent diseases, including lung cancer, bladder cancer, chronic obstructive pulmonary disease and cardiovascular disease.

The jury further found that the class' risk of contracting one or more of those diseases is greater than it would have been had they not been exposed to cigarettes manufactured and sold by these defendants in Louisiana, found that the class' risk of contracting one or more of those diseases was greater than the risk of members of the public at large who did not smoke, and that monitoring procedures existed that made the early detection of one or more of those diseases possible.

With respect to the claim for cessation of smoking, the jury found that the plaintiffs' claim proved that smoking cessation methods or aids exist that will assist smokers in stopping smoking, determined that such smoking cessation methods or aids had been prescribed by qualified physicians, found that such smoking cessation methods or aids were reasonably necessary according to contemporary scientific principles and determined that there is clinical value to smoking cessation programs.

Finally, with respect to the issue of consent, the jury determined that the class of Louisiana smokers did not know that cigarettes manufactured by these

defendants were designed and manufactured to cause addiction and that such addiction thus caused would expose the class to significant levels of substances proven hazardous to human health.

The Phase II Trial

This trial court certified this action as one for the establishment of a single, unitary, common, equitable, court-supervised medical monitoring and/or cessation of smoking program fund. All individual compensatory damage claims were reserved. The Supreme Court of Louisiana affirmed this court's certification.

This trial court is of the opinion that the Phase II proceedings are equitable or injunctive in nature, thereby removing any necessity for a trial by jury. (See, *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 982 (Utah, 1993), *Ayers v. Township of Jackson*, 525 A.2d 287, 314 (N.J. 1987), *Redland Soccer Club v. Department of the Army*, 696 A.2d 137, 142 n. 6 (Pa. 1997), *Petito v. A.H. Robins*, 750 So.2d 103, 105 (Fla. App. 3 Dist 1999), *review denied*, 780 So.2d 912 (Fla. 2001), *In re Teletronics*, 172 F.R.D. 271 (S.D. Ohio 1997), *Craft v. Vanderbilt*, 174 F.R.D. 396 (M.D. Tenn. 1996), *Gibbs v. DuPont*, 876 F.Supp. 475 (W.D.N.Y. 1995), *Day v. NLO*, 144 F.R.D. 330 (S.D. Ohio 1992) *and* 851 F.Supp. 869 (S.D. Ohio 1994), *Yslava v. Hughes Aircraft*, 845 F.Supp. 705 (D. Ariz. 1993), *Cook v. Rockwell International*, 151 F.R.D. 378 (D. Colo. 1993). The Supreme Court of Louisiana relied upon *Hanson, supra, Ayers, supra and Redland Soccer, supra*, as a basis for the Louisiana medical monitoring remedy. See *Bourgeois*, 716 So.2d at 359-360. Commentators have similarly noted that a court-administered fund,

which establishes "pooled resources" for the early detection and advances in treatment of the disease is injunctive in nature. *Schwartz and Sutherland, Class Certification for Environmental and Toxic Tort Claims*, 10 Tul. Envtl. L.J. 187, 198 (1997). However, in the exercise of caution, this court has not discharged the Phase I jury. (This court determined in Trial Order No. 1 that this matter would be tried in phases by the same jury.) The trial court is of the opinion, however, that the class-wide claim for the establishment of the court supervised medical monitoring and/or cessation program fund is effectively an equitable or injunctive proceeding, obviating the need to have a jury adjudicate Phase II issues, which are set out in Trial Order No. 10. However, Trial Order No. 10 for the Phase II trial is set to be tried by jury.

The Phase I jury, in accordance with established jurisprudence, in particular, *Day v. NLO*, 852 F.Supp.Ct. 875-887, cited *supra*, made a class-wide determination that the class of Louisiana smokers is entitled to the establishment of that fund for cessation assistance. After the Phase II trial, which will establish the threshold requirements for the establishment of the programs, the eligibility for the programs and the scope and content of the programs, the court intends to follow the procedures set forth in the jurisprudence from other states in order for class members to establish eligibility for the fund. The proceedings will become non-adversarial, and when there is a conflict about a course to be taken in the administration of the program, the Plan Administrator or a party may apply to the court. Individual claims will be processed by a Special Master or a committee of counsel appointed by the

court. The processing of claims will not jeopardize defendants' due process rights. The defendants have been given, and will be given, full opportunity to challenge the program, the eligibility and the process in Phase II.

The reviewing courts should note that the only claim that class representatives, Ms. Scott, Ms. Jackson or any other member of the defined class will have, is the right to apply for participation in a cessation of smoking program from the established fund. The fund, through its physicians, administrators or other trustees will determine, based on criteria established during the Phase II trial, whether a class member is indeed eligible to participate in the program and, if so, the particular benefits to which he or she may be entitled. The elements of fault, causation, damage and affirmative defenses have already been adjudicated by the Phase I jury. Those claims and defenses that have been decided are only relevant to the claims of the class as a whole. The only "damages" to be assessed in Phase II is "damage common to the class" under former Louisiana Code of Civil Procedure Art. 593.1(C)(2) and (C)(3). Any "determination and assessment of individual damages," as contemplated by former Art. 593.1(C)(4) has been reserved to later phases of this trial. This approach is consistent with the approach taken in other jurisdictions and the defendants have cited to the trial court no controlling authority for the proposition that they have a "due process" right to conduct an individualized jury trial for each class member in a proceeding where the plaintiff's action is limited to a claim to participate in or receive a benefit from an equitable, court-supervised, third party, trust fund. The defendants have had the full

and fair due process right to present evidence during the Phase I trial, which trial included all issues of liability and causation. They were given the opportunity to defend their liability to the plaintiffs as a class for intentional conduct which caused, contributed to, or was a substantial factor in causing, or concurred with other factors in causing nicotine dependence and/or addiction resulting in a significantly increased risk of harm. The defendants also have the full and fair opportunity to demonstrate that there is no basis for the establishment of a medical monitoring and/or cessation program under *Bourgeois* or under any other applicable Louisiana law.

It is important to note, that once the court-supervised program is established, if it is established at the Phase II trial and affirmed by the reviewing court(s) the claim of an individual class member is no longer a claim against the defendants, but becomes the claim against the court-supervised fund. The defendants claim that they had the right to try Ms. Scott and Ms. Jackson's individual cases in the Phase I trial is contrary to the Orders of the Fourth Circuit Court of Appeal and the Supreme Court of Louisiana.

"Addiction" is Not a Prerequisite to Recovery

Defendants claim that the plaintiffs' class are required to prove that each individual class member is "addicted" to cigarettes as a prerequisite to participate in a program. However, the jury determined that the intent and the effect of the defendants' conduct was, and is, to encourage addiction which resulted in a significantly increased risk of developing serious illness or disease, which

leads to premature death. No class member or other person who is not dependent on cigarettes would ever consider availing him or herself of a smoking cessation program. Therefore, as a matter of "due process" for res judicata purposes, the defendants do not need to know precisely who is in the class, nor is it necessary that each and every class member be determined to be clinically addicted to nicotine. The only people who will seek to participate in this program will be those who desire to participate, those who are addicted or dependent upon or otherwise suffering from difficulty in quitting the habit. Neither Civil Code Art. 4, Civil Code Art. 2325, Amended Civil Code Art. 2315, the Louisiana Code of Civil Procedure, the Louisiana Constitution, the United States Constitution, the *Scott* Class Definition, the *Bourgeois* case, or any other authority requires that in order to participate in the cessation program, the plaintiff must prove that he or she is "addicted" to something.

Therefore, the defendants contentions that each individual class member's case must be tried individually (and therefore the case should be decertified), is contrary to the law applicable to this case, Louisiana law in general and the facts of this case.

There are no remaining liability issues. Individual addiction is not a prerequisite to participation in the program. Individual causation, to the extent that it is an issue, will be determined administratively and not by a jury. Likewise, individual reliance is not an issue.

Comparative Fault is Not and Should Not Be Applicable to this Case

Based upon the Phase I trial record, this trial court has determined that the principles of comparative fault do not, and more importantly, should not apply to this case. Applying comparative fault to this intentional act, fraud and conspiracy case would vitiate the very public policy that underlies the doctrine of comparative fault.

The liability trial record reveals 50 years of intentional fraudulent conduct and a conspiracy by the defendants to consciously addict the class of Louisiana smokers and to hide their knowledge that nicotine is addicting for the purpose of maintaining that addiction. The Phase I trial record further revealed that the defendants had knowledge 50 years ago, that their products contained cancer-causing chemicals and other substances that caused serious illnesses and diseases that presently lead to the death of 400,000 Americans each year. The trial record further revealed that the defendants individually, and conspiring among themselves, concealed their knowledge of the effects of smoking their products from the class of Louisiana smokers, and then created a false front, a public relations front (the Tobacco Institute and progeny), to keep the class members smoking by constantly and consistently asserting that any relationship between smoking, disease and death was an "open question," rather than a proven fact. The trial record further revealed that the true purpose of the Tobacco Institute and its progeny was to keep the smoking and health controversy open so that smokers could justify, psychologically, the habit of smoking. The

record also revealed that the companies promised, through means other than advertising and promotion, that they would investigate the true relationship between cigarettes and disease, and would then reveal the truth to the American public. The jury determined that all of this was false. The Phase I trial record showed, and the jury found, that the defendants committed fraud and intentionally conspired to commit that fraud. The jury found that the defendants consciously desired to promote addiction, knew that addiction was substantially certain to follow, intended to addict smokers to their products which exposed smokers to hazardous substances, intentionally engaged in actions to distort the body of public knowledge concerning nicotine and the relationship between smoking and disease, intentionally refused to investigate and disclose the facts known to them about the addictive properties of nicotine and the relationship between smoking and disease and intentionally breached their assumed duties not to market their product to the children of Louisiana. The jury also found that the defendants intentionally breached their assumed duties to research the relationship between smoking and disease and their voluntarily assumed duty to tell the truth about what they found. The jury, in summary, found that the defendants' conduct was intentional and fraudulent.

For a synopsis of the evidence submitted in support of the jury's findings, the reviewing court(s) should review the excerpts of the trial exhibits attached to the Plaintiffs' Opposition to the Writ Application to the Fourth Circuit Court of Appeal. The reviewing court(s) should also refer to the Final Report and Recommendations of the Special Master

of January 14, 2003 (court Exhibit "C"), which sets forth the Special Master's Findings of Fact and Conclusions of Law with respect to whether the crime-fraud exception to the attorney-client and work-product privileges applied to documents claimed to be privileged by the defendants. In the pretrial proceedings, the Special Master held weeks of hearings to assist the court in determining whether approximately 129 documents were privileged or excepted by the crime-fraud exception to the attorney-client and attorney work-product privilege. The Special Master reviewed the non-privileged documentary evidence and determined that the defendants committed fraud in five areas for purposes of determining whether the crime-fraud exception applied to the claim of privilege. Those areas of fraud are:

1. Fraud relating to the Smoking and Health "controversy";

2. Fraud related to the Tobacco Research Counsel, Its Successor and Lawyer Involvement

3. Fraud related to Nicotine as an Addictive Substance;

4. Fraud concerning Low Tar and Nicotine Cigarettes

5. Fraud relating to the Manipulation of Nicotine

This trial court adopted the Report and Recommendations of the Special Master concerning these documents, overruling defendants' objections to the Special Master's Report and Recommendations. The court now references and adopts the Special Master's conclusions concerning the defendants' intentional conduct and fraud and unseals the

Special Master's Report and Recommendation of January 14, 2003. The Special Master's Report and Recommendations succinctly sets forth the history behind the intentional conduct and fraud found by the Phase I jury.

Consequently, in accordance with the Supreme Court of Louisiana's November 15, 2002 Order, this court determines that comparative fault does not, and should not, apply. This Phase I trial record reveals a thoroughly intentional plan by the defendant cigarette manufacturers to addict the class of Louisiana smokers with substantial certainty that the class of Louisiana smokers would be seriously harmed and that thousands of Louisiana citizens would be subjected to an increased risk of contracting serious latent diseases that lead to death. Louisiana Civil Code Art. 2323 (C), in clear and unambiguous terms, provides that where the defendants' conduct is intentional, comparative fault does not apply. Neither *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La. 1985), nor *Veazey v. Elmwood Plantation Associates Ltd.*, 650 So.2d 712 (La. 1994), holds that comparative fault applies to produce a plaintiff's recovery where the tortious conduct of the defendant is intentional. The trial record reveals, without any doubt, that the defendants' conduct was intentional and fraudulent.

Analyses under the *Jet Wheel Blast* and *Veazey* rationale require the consideration of important policy issues. The Supreme Court of Louisiana has instructed that the recovery of a plaintiff who has been injured by a defective product should not be reduced in those types of cases in which it does not serve realistically to promote careful product use or

where it drastically reduces the manufacturer's incentive to make a safer product. In this case, the application of comparative fault would not be appropriate. Among other things, the harm is not the result of any misuse or abuse of the product by the plaintiffs, but rather from the intentional conduct of the defendants; thus, any incentive to the plaintiffs to stop smoking would be severely compromised, if not eliminated, by the fact that the product is highly addictive and any incentive not to smoke is significantly undercut by the fact that the overwhelming majority of smokers begin smoking when they are children.

Additionally, cigarettes cause damage when used precisely as the defendants intend them to be used. This is not a case where the risk arises from the potential for the plaintiff to mishandle the product or failed to use a safety measure or a guard. There is no allegation that the plaintiff's class misused or abused cigarettes. The plaintiffs' class used the product as intended. The trial court is of the opinion that the plaintiffs should not be adjudicated in any sense negligent for using a legal product in the precise manner that the defendants intended and desired. The application of comparative fault principles would not promote careful product use.

The Phase I trial evidence also revealed that the defendants kept their knowledge to themselves that nicotine is addictive and that smoking clearly, without question, causes deadly diseases. The record revealed that defendants not only conspired to keep that information from the class of Louisiana smokers, but consciously and intentionally devised a 50-year scheme to induce smokers to keep smoking

by means of promises to investigate the risks of smoking and to tell the truth about those risks. The Phase I trial jury heard evidence that the defendants never intended to tell the truth; rather they created and used the Tobacco Institute and its progeny (the "research" arm of the cigarette industry) simply as a public relations front to hide the truth from this class of Louisiana smokers to keep the smokers smoking. The Phase I trial evidence showed and the jury found that the defendants consciously and intentionally intended to addict the class of Louisiana smokers and to induce them to keep smoking by relying on the manufacturers' assumed duty to investigate the truth about smoking and health and their promise to reveal the truth to the class of Louisiana smokers. The Phase I trial evidence reveals that the defendants intended no such thing. The Phase I liability trial evidence revealed that the defendants' only purpose was to keep the class of smokers smoking.

Consequently, the defendants should not benefit from their intentional and fraudulent conduct and their 50-year old conspiracy.

Another factor which strongly weighs against the application of comparative fault, is the fact that the defendants products are addictive. While in theory ,the application of comparative fault might serve to promote safe product use (non-use), the reality that such incentive would be severely compromised is not eliminated by the addictive quality of the product, one of the primary qualities that keeps the smokers smoking. The jury determined that nicotine was a substantial factor in keeping smokers smoking. A reduction of the contributions due and owing to the

judicially-established medical monitoring and/or cessation program fund could only result in a slight incentive for consumers to "use the product more carefully" (or use it less or not at all). However, particularly given the fact that smokers are addicted to defendants' cigarettes, it is much more likely that the imposition of comparative fault would further contribute to the defendants' refusal to develop safer products for their customers. The Phase I trial evidence revealed support for the proposition that there are safer alternatives available to these manufacturers, alternatives these defendants have refused to manufacture and market effectively.

Still other policy considerations weigh against the imposition of comparative fault. The Phase I trial evidence shows that the overwhelming majority of the plaintiffs' class members are addicted to cigarettes while they are still young children. Most smokers begin between the ages of 12 and 17 years of age. While in theory, the application of comparative fault might promote careful product use (or non-use), the reality is that the legal consequences of smoking from a product liability standpoint or in the mind of a child, if existent at all, is distant and remote. The sale of cigarettes to minors is unlawful in the State of Louisiana. Minors do not have the capacity to contract. Consequently, minors should not be held comparatively at fault when they are members of a class protected by the statute and whose actions, even if negligent, fell within the scope of the statute's protection. Applying comparative fault principles to this case, would result in no benefit to the class and would only benefit the defendants.

Still another reason why comparative fault should not apply to this case is the fact that the scope of the defendants' duty did encompass the exact risk of repeated exposure to the product causing an increased risk of harm. In *Veazey*, the Supreme Court of Louisiana established a general rule that an allocation of fault between intentional and negligent tort feasors should generally not be made when the scope of the tort feasor's duty encompasses the risk that the negligent conduct of the other will combine to produce the foreseeable injury or harm. In this case, the jury found that the scope of the defendants' duty clearly encompassed the risk of the occurrence, resulting in the plaintiffs' addiction and increased risk of harm. The application of comparative fault principles based upon the Phase I trial record would reduce the incentive of these manufacturer (and perhaps other manufacturers) to disclose material information and to make the product as safe as they can. Such a result is clearly contrary to the public policy of Louisiana.

The liability trial record in this case also revealed that the defendants' intentional wrongdoing is, was and will always be fundamentally different in nature than plaintiffs' negligence, if any. A true comparison of fault –between the intentional conduct of a multi-billion dollar corporation with scientists who have complete and total knowledge of their product and hundreds of years of experience and access to state of the art equipment and research versus the negligence or fault of a teenager, or even an unknowledgeable adult smoker who was addicted to a defendants' product, is simply not possible.

Prior to October, 1999, the defendant manufacturers consistently misrepresented that cigarettes were not addictive and that the link between smoking and health had not been "proven" and that there was a real "controversy" and therefore an "open question" about the relationship between smoking and diseases. The Phase I trial evidence revealed to the contrary. The defendants knew for at least 50 years that the product was addictive and knew that smoking their product causes deadly diseases. The evidence in this case led the Phase I jury to the findings that defendants' conduct was intentional across the board, and conspiratorial. Accordingly, the defendants should be estopped from making the argument that the public generally, Louisiana smokers in particular, knew or should have know these facts which the defendants have consistently misrepresented to be untrue or unknown. If comparative fault applies, these defendants would profit by their own wrong, a concept repugnant to Louisiana law. *Hyman v. Hibernia Bank and Trust*, 71 So.2d 598 (La. 1916).

Additionally, comparative fault is inapplicable to this equitable claim for the establishment of a unitary, common court-supervised medical monitoring and/or cessation program fund. Louisiana Civil Code Art. 2323 only applies to claims for damages. As the Supreme Court of Louisiana made clear in *Bourgeois*, an award of "damages" is a monetary award that the plaintiff can spend as he or she sees fit. In this case, the only remedy certified for class-wide resolution is compensation in the form of a judicially administered fund. Therefore, the comparative fault provisions of Louisiana Civil Code Art. 2323(A) do not and should not apply.

The trial record, the jury determination, Louisiana Civil Code Art. 2323 and Louisiana law and policy, militate against comparative fault. Comparative fault should not apply in this case.

Prescription

The court overruled the defendants' exceptions of prescription twice during the pretrial proceedings, and overruled those exceptions again in Trial Order No. 10 based upon the Phase I liability trial record.

The jury determined that the defendants intentionally promoted dependence upon nicotine from at least December 1953 through at least May 24, 1996, when this suit was filed. The jury also determined that the defendants engaged in a fraudulent conspiracy to suppress information and distort the truth from at least January, 1954 through May 24, 1996. Consequently, the continuing tort doctrine applies.

The court also determines that the doctrine of *contra non-valentem* applies. The Phase I trial evidence showed that the defendants consistently represented, argued and intentionally misrepresented before the American public and the Congress of the United States that they did not manipulate nicotine levels, that nicotine was not addictive and that the relationship between smoking and disease was not proven. Since that is the evidence in the Phase I trial record, how can the class of Louisiana smokers know, or how should they have known that the defendants were fabricating these statements? Equity, fairness and conscience militates that the defendants be estopped from benefiting from their intentional misrepresentations.

The Phase I record also revealed that the class of Louisiana smokers did not know that the defendants were intentionally manipulating nicotine delivery in the design of their products to create and maintain addiction until the late 1990's. For this reason also, prescription should not be applied to bar the class of Louisiana smokers. The jury, in finding no. 11, found that the defendants failed to tell the truth about what they knew about whether nicotine was addictive, intentionally engaged in actions designed to distort the body of public knowledge concerning smoking and health (finding no. 19), were successful in distorting the body of public knowledge concerning smoking and health (finding no. 20), intentionally engaged in actions designed to distort the body of public knowledge concerning the properties of nicotine (finding no. 21), were successful in distorting the body of public knowledge concerning properties of nicotine (finding no. 22) and, in finding no. 25, found that there was detrimental reliance on the distorted body of public knowledge concerning smoking and public health by an intended and foreseeable class of Louisiana citizens. Likewise, the jury found that there was detrimental reliance on the distorted knowledge concerning the properties of nicotine by an intended and foreseeable class of Louisiana citizens (finding no. 26). The jury further determined that such reliance on the distorted knowledge concerning smoking and health by the class was reasonable (finding no. 27) and found that the reliance on the distorted body of knowledge concerning the properties of nicotine by the class was also reasonable (finding no. 28). The jury further determined that the reliance by the class on the distorted body of public knowledge concerning the

properties of nicotine caused or contributed to the need for medical monitoring and cessation of smoking programs (finding no. 30).

Based upon the record of the Phase I trial, and in accordance with the Supreme Court of Louisiana's November 15, 2002 Order, this trial court determines that the defendants' exceptions of prescription should be overruled.

There Are No Remaining Liability Issues

Individual Addiction

"Individual addiction" is not a prerequisite to participation in a cessation program. Individual causation, to the extent it is an issue, will be determined administratively and not by a jury.

Reliance

The certified claim is one for a single, common, unitary, equitable, court-supervised fund by the class as a whole. Therefore, the only question of "reliance," was a question as to the reliance of a class as a whole. If and when individual class members assert individualized claims for money damages, then there may be a requirement for those class members to establish individualized reliance at that time. But, individual reliance is not an issue in these proceedings. Additionally, the jury found class-wide "reliance" (finding nos. 25-30). Specifically, the jury determined that there was "detrimental reliance" on the distorted knowledge concerning smoking and health by an intended and foreseeable class of Louisiana citizens, there was "detrimental reliance" on the distorted knowledge concerning the properties of nicotine and that such reliance was "reasonable" (finding nos. 27, 28).

This trial court distinguishes this case from the *Banks* case. The *Banks* case involved a one-time purchase of an insurance policy in "reliance" upon the representations of insurance agents or misleading illustrations. The fraud in *Banks* was not a fraud of omission but a fraud by affirmative misrepresentation. The representations made in *Banks* were non-uniform and varied among the 1,000+ insurance agents who sold insurance policies. In this case, the Phase I trial record revealed an enormous effort lasting five decades involving primarily fraud of suppression, concealment and omission. The Phase I trial evidence revealed that the fraudulent scheme was targeted at a large portion of the American public and such fraud was designed to distort the entire body of public knowledge rather than to individually mislead millions of individual class members. And, indirect channels of communication were used by these defendants. The Phase I trial evidence revealed a five decade long public relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though the defendants knew that such an impression was false. The trial record reveals that the defendants sought to create doubt about the connection between smoking and disease so that smokers would have something to justify beginning or continuing to smoke. Other courts who have reviewed this same evidence have also found and held that where a defendants' lengthy course of prohibitive conduct affects a large number of consumers, like the class of Louisiana smokers, and the defendants use indirect communications designed to distort the entire body of public

knowledge, the showing of reliance that must be made to prove a causal connection between smoking and the class' reliance on communications from the defendants need not include direct evidence of reliance by individual consumers of the defendants' cigarettes. Rather, the causal connection may be established by other direct or circumstantial evidence that a court determines is relevant and probative as to the relationship between the class claim and the prohibited conduct. *See*, NEWBERG & CONTE, *Newberg On Class Actions*, 3rd Edition, 1992 §§ 4.26, 10.12. Judge Weinstein of the United States District Court for the Eastern District of New York in *Falise v. American Tobacco Company*, 94 F.Supp.2d 316 (E.D. NY 2000), said it best when he wrote:

> "Where . . . a fraudulent scheme is targeted broadly at a large portion of the American public, the requisite showing of reliance is less demanding. Such sophisticated, broad-based fraudulent schemes by their very nature are likely to be designed to distort the entire body of public knowledge rather than to individually mislead millions of people . . . to require reliance on specific misrepresentations where indirect challenges on communication were integral to the success of the scheme would produce the perverse result of having the most massive and sinister fraudulent schemes be the ones that must escape : . . liability."

The trial court agrees with Judge Weinstein and the courts of other jurisdictions who have addressed this issue. Individual reliance is not an issue. The Phase I jury determined all issues of class-wide reliance.

Consent

Consent is not applicable to this case. Based on the trial record, consent is vitiated by the defendants' superior knowledge and inducement of the plaintiffs' class members to smoke with the intent and the desire that they become addicted. Notwithstanding, the consent issue was tried to the Phase I jury and rejected.

Additionally, consent is not commonly recognized as a defense to fraud and conspiracy claims. The jury determined that the defendants breached their voluntarily assumed duty not to market their product to children. Louisiana recognizes that minors do not have the ability to consent with fully informed and rational choices. Clearly, the defendants had superior knowledge of the property of their products and intentionally withheld and/or misrepresented that knowledge.

Landry v. Bellanger, 813 So.2d 598 (La. App. 1st Cir. 2002) is not applicable in this case. The Phase I trial evidence revealed that the class of Louisiana smokers used the product as intended by the manufacturers. There is no authority for the proposition that such users are guilty of the self-infliction of an "intentional tort" precluding application of Louisiana Civil Code Art. 2320 (C). The evidence revealed that the class of Louisiana smokers used the defendants products as intended. Plaintiffs did not use force or threaten force against

the defendants or anybody else. The plaintiffs did not provoke the defendants into an altercation, a fight and did not force the defendants to manufacture their products as they have. The evidence revealed that the class of Louisiana smokers smoked cigarettes in the way the defendants intended them to be smoked, with assurances by the defendants that the case against cigarettes had not been proven and that cigarettes were not addictive. Consequently, a consumer who voluntarily uses a product as intended should not be guilty of an intentional tort.

The Phase I jury found, specifically, that the defendants failed to prove that the class knew what the defendants knew and failed to prove that the plaintiffs' class knew that the defendants had engaged in fraudulent conduct; consequently, the jury rejected defendants' claim that the class of Louisiana smokers "consented" to the harm. Where the defendant has superior knowledge and/or induces the plaintiff to act, consent is vitiated. *Fricke v. Owen-Corning*, 571 So.2d 130, 133 n. 1 (La. 1990); citing RESTATEMENT (2nd) OF TORTS §892 (B)(1965). *See also Cole v. Department of Public Safety and Corrections*, 825 So.2d 1134 (La. 2002), which stands for the proposition that consent is vitiated where the defendant exerts unnecessary and unanticipated force. In this case, the jury found that the defendants had superior knowledge and induced the class to smoke by means of youth targeting and marketing, with the desire and intent that they become addicted. Consequently, any "consent" by the class would be vitiated by the defendants' conduct.

A copy of this Per Curiam has been served on Liasion Counsel by hand delivery.

November 4, 2003.

(Sgd) Richard J. Ganucheau
Richard J. Ganucheau
Judge, *Ad Hoc*

APPENDIX K

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 96-8461 AD HOC DIVISION
CLASS ACTION CLAIM

GLORIA SCOTT and DEANIA M. JACKSON, on behalf of themselves and all other persons similarly situated

VERSUS

THE AMERICAN TOBACCO COMPANY, INC., et al.

FILED: _____ _____
DEPUTY CLERK

TRIAL ORDER NO. 10

In accordance with the November 15, 2002 Order of the Supreme Court of Louisiana and Trial Order No. 1, this Court ordered that this matter be tried in phases in accordance with La. C.C.P. Art. 593.1.

Pursuant to that Order, all common issues of liability (fault and causation, including the *Bourgeois* factors) including all applicable class-wide defenses and affirmative defenses, were tried on a class-wide basis to a jury in the Phase I trial and the jury rendered a Special Verdict in accordance with La. C.C.P. Art. 1812 on July 28, 2003. (See Trial Order No. 7 of December 9, 2002 and the Special Verdict form, attached.) Based upon the factual findings of the jury and, under the authority of *Bourgeois v. A.P. Green Industries, Inc.*, the class of Louisiana smokers has demonstrated a need for court administered smoking cessation programs designed to assist the class of Louisiana smokers who desire to quit smoking and to prevent relapse and, consequently, a need for the establishment of a court administered and supervised fund to deliver the programs to eligible class members.

The Court therefore determines that a Phase II trial is necessary and that trial shall be conducted in accordance with this Order and tried by the Phase I jury.

Pursuant to La. C.C.P. Art. 1734.1 C, defendants are hereby ordered to supplement the deposit for jury costs, in the amount of $20,000.00, prior to October 31, 2003.

I.

The Phase II trial shall determine the items of damage common to the class and the basis for assessment thereof in accordance with La. C.C.P. Art. 593.1(C)(2).

II.

The Phase II trial shall determine the nature, types and components of such cessation programs,

the parameters of the programs, the procedures to be adopted for the establishment, implementation, delivery and administration of the programs, the requirements for eligibility of the class of Louisiana smokers who desire to participate in the programs, the duration of the programs, methods for insertion of the programs into the existing public and private healthcare infrastructure in the State of Louisiana, the costs of the programs and the procedures for the establishment and the administration of the court-supervised fund.

III.

In accordance with Louisiana Code of Evidence Art. 706, the Court may appoint one or more experts to advise it on the matters referenced in paragraph II above. The court has issued a Show Cause Order in that regard.

IV.

In accordance with the directive of the Supreme Court of Louisiana in its November 15, 2002 Opinion and Order, the Court determines that, based upon the evidence of the Phase I liability trial and governing principles of Louisiana law, the principles of comparative fault and the defense of assumption do not, and should not, apply in this case, for reasons to be set forth in a Per Curiam opinion to be filed in this record at a later date.

V.

The Court also determines that there remain no liability issues to be tried on a class-wide basis.

VI.

Consent is not applicable but, in any case, was rejected by the jury.

VII.

The claim is for a single, common, unitary, equitable, court-supervised fund by the class as a whole. Therefore, the only question of reliance is reliance of the class as a whole and the Phase I jury found class wide reliance. Individual reliance is not an issue in Phase II but rather is reserved for Phase IV individual, monetary damages trials.

VIII.

The defense of failure to mitigate is not applicable since participation in a cessation program is mitigation in and of itself.

IX.

Prescription was tried on a class-wide basis in the Phase I trial. Based upon the Phase I evidence, the doctrines of *contra non valentum* and continuing tort apply. Consequently, Defendants' Exceptions of Prescription are overruled.

X.

The parties are ordered to submit to the Court, within forty-eight (48) hours of the service of this Order, any additional issues that the parties suggest should be tried in accordance with the Special Verdict of the jury of July 28, 2003, the November 15, 2002 Order of the Supreme Court and Trial Order No. 1.

XI.

The determination and assessment of individual damages not common to the class is reserved to later phases of these proceedings, in accordance with La. C.C.P. Art. 593.1(C)(4).

XII.

The Opening Statements will be delivered on December 3, 2003 at 9:30 a.m. and are limited to one (1) hour per side. The parties are to report at 9:00 a.m. The Court will issue Case Management Order No. 3 that will govern the Phase II pre-trial and trial proceedings. The Special Master is ordered to consult with the parties and present a draft of Case Management Order No. 3 to the Court no later than October 19, 2003.

XIII.

All provisions of prior Trial Orders not inconsistent with the November 15, 2002 Order and Opinion of the Supreme Court of Louisiana and this Trial Order remain in effect.

XIV.

The parties are ordered to meet, cooperate and coordinate their efforts to facilitate the Phase II trial with the Special Master.

XV.

The parties and counsel are hereby prohibited from communicating with, or attempting to influence, in any manner whatsoever, the members of the jury selected to hear this case. The parties and counsel are further ordered to report, immediately, to this Court and to the Special Master, any attempt to communicate with or influence the members of the jury during the pendency of these proceedings, under the penalty of contempt of court and/or the striking of claims and defenses.

New Orleans, Louisiana, this 29th day of Sept, 2003.

Richard J. Ganucheau
Richard J. Ganucheau
Judge Pro Tempore

APPENDIX L

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 96-8461 **AD HOC DIVISION**
CLASS ACTION CLAIM **JUDGE GANUCHEAU**

GLORIA SCOTT and DEANIA M. JACKSON, on behalf of themselves and all other persons similarly situated

VERSUS

THE AMERICAN TOBACCO COMPANY, INC., et al.

FILED: _____ _____
DEPUTY CLERK

SPECIAL VERDICT

TO THE MEMBERS OF THE JURY:

This Special Verdict Form must be filled out in accordance with the directions. When nine jurors agree on the answers to the questions that must be

answered, the Foreperson should sign and date the Special Verdict Form, and then notify the Court.

I. **GENERAL**

1. Have the plaintiffs proven that Gloria Scott was a resident of the State of Louisiana on May 24, 1996?

YES __√__ NO ____

2. Have the plaintiffs proven that Deania Jackson was a resident of the State of Louisiana on May 24, 1996?

YES __√__ NO ____

3. Have the plaintiffs proven that, on or before May 24, 1996, Gloria Scott smoked cigarettes manufactured by one or more of these defendants?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

4. Have the plaintiffs proven that, on or before May 24, 1996, Deania Jackson smoked cigarettes manufactured by one or more of these defendants?

Philip Morris USA Inc. YES √ NO ____

R. J. Reynolds Tobacco Company
YES √ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES √ NO ____

Lorillard Tobacco Company YES √ NO ____

5. Have the plaintiffs proven that any of these defendants on or before May 24, 1996, sold their cigarette products in the State of Louisiana?

Philip Morris USA Inc. YES √ NO ____

R. J. Reynolds Tobacco Company
YES √ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES √ NO ____

Lorillard Tobacco Company YES √ NO ____

6. Have the plaintiffs proven that any of these defendants manufactured cigarettes sold to consumers in Louisiana, on or before May 24, 1996, which contained nicotine?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company

YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)

YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

7. Have the plaintiffs proven that the nicotine contained in the cigarettes manufactured by the defendants and sold to consumers in Louisiana by any of these defendants beginning in December, 1953 and continuing through May 24, 1996, contained nicotine at levels that caused addiction?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company

YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)

YES __√__ NO ____

Lorillard Tobacco Company YES √ NO ____

8. Have the plaintiffs proven that any of these defendants beginning in December, 1953 and continuing through May 24, 1996, knew that their cigarette products contained nicotine at levels that caused addiction?

Philip Morris USA Inc. YES √ NO ____

R. J. Reynolds Tobacco Company
YES √ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES √ NO ____

Lorillard Tobacco Company YES √ NO ____

9. Have the plaintiffs proven that the nicotine in the cigarettes manufactured by any of these defendants and sold to consumers in Louisiana beginning in December, 1953 and continuing through May 24, 1996, was a substantial factor in causing or contributing to the class of Louisiana smokers to begin smoking?

Philip Morris USA Inc. YES ____ NO √

R. J. Reynolds Tobacco Company
YES ____ NO √

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES ____ NO __√__

10. Have the plaintiffs proven that the nicotine contained in the cigarettes manufactured by any of these defendants and sold to consumers in Louisiana beginning in December, 1953 and continuing through May 24, 1996, was a substantial factor or a contributing cause to the class of Louisiana smokers to continue smoking?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ___

11. Have the plaintiffs proven that any of these defendants, beginning in December, 1953, and continuing through May 24, 1996, failed to tell the truth about what they knew

about whether nicotine was an addictive substance?

Philip Morris USA Inc. YES _ √ _ NO ____

R. J. Reynolds Tobacco Company
YES _ √ _ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES _ √ _ NO ____

Lorillard Tobacco Company YES _ √ _ NO ____

12. Have the plaintiffs proven that the cigarettes manufactured by any of these defendants and sold to consumers in Louisiana beginning in December, 1953, and continuing through May 24, 1996, gave rise to a significant exposure to substances proven hazardous to human health?

Philip Morris USA Inc. YES _ √ _ NO ____

R. J. Reynolds Tobacco Company
YES _ √ _ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES _ √ _ NO ____

Lorillard Tobacco Company YES _ √ _ NO ____

13. Did any of these defendants, beginning in December, 1953, and continuing through May 24, 1996, know that cigarettes and cigarette smoke contained substances proven hazardous to human health?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

14. Did any of these defendants, beginning in December, 1953, and continuing through May 24, 1996, fail to tell the truth about what they knew about whether cigarettes and cigarette smoke containing substances hazardous to human health in communications to an intended and foreseeable class of Louisiana citizens, outside the realm of advertising or promotion?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES _√_ NO ___

Lorillard Tobacco Company YES _√_ NO___

15. Have the plaintiffs proven that any of these defendants consciously desired to promote addiction to cigarettes?

Philip Morris USA Inc. YES _√_ NO ___

R. J. Reynolds Tobacco Company
YES _√_ NO ___

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation) YES _√_ NO ___

Lorillard Tobacco Company YES _√_ NO ___

16. Did any of these defendants know that addiction was substantially certain to follow from their conduct in designing and manufacturing cigarettes?

Philip Morris USA Inc. YES _√_ NO___

R. J. Reynolds Tobacco Company
YES _√_ NO ___

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES _√_ NO ___

Lorillard Tobacco Company YES √ NO ___

17. Have the plaintiffs proven that the addiction intended by one or more of these defendants, exposed the class of Louisiana smokers to significant levels of substances proven hazardous to human health sufficient to significantly increase the risk of contracting a serious latent disease related to cigarettes?

Philip Morris USA Inc. YES √ NO ____

R. J. Reynolds Tobacco Company YES √ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation) YES √ NO ___

Lorillard Tobacco Company YES √ NO ___

II. **THE CLAIM OF FRAUD**

18. Have the plaintiffs proven, beginning in January, 1954, and continuing through May 24, 1996, that the Tobacco Industry Research Committee, the Tobacco Institute, and the Council for Tobacco Research, were the alter egos of one or more of these defendants?

Philip Morris USA Inc. YES _√_ NO ____

R. J. Reynolds Tobacco Company
YES _√_ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES _√_ NO ___

Lorillard Tobacco Company YES _√_ NO ___

19. Have the plaintiffs proven that any of these defendants, beginning in January, 1954, and continuing through May 24, 1996, intentionally engaged in actions designed to distort the body of public knowledge concerning smoking and health?

Philip Morris USA Inc. YES _√_ NO ____

R. J. Reynolds Tobacco Company
YES _√_ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES _√_ NO ____

Lorillard Tobacco Company YES _√_ NO ___

- **If your answer to Question #19 if YES for any defendant, continue.**

- **If your answer to Question #19 is NO for all defendants, skip to Question #21.**

20. Have the plaintiffs proven that any of these defendants, beginning in January, 1954, and continuing through May 24, 1996, were successful in distorting the body of public knowledge concerning smoking and health?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ___

21. Have the plaintiffs proven that any of these defendants, beginning in January, 1954, and continuing through May 24, 1996, intentionally engaged in actions designed to distort the body of public knowledge concerning the properties of nicotine?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)

YES _√_ NO ___

Lorillard Tobacco Company YES _√_ NO ___

- **If your answer to Question #21 is YES for any defendant, continue.**

- **If your answer to Question #21 is NO for all defendants, skip to Question #23.**

22. Have the plaintiffs proven that any of these defendants, beginning in January, 1954, and continuing through May 24, 1996, were successful in distorting the body of public knowledge concerning the properties of nicotine?

Philip Morris USA Inc. YES _√_ NO ____

R. J. Reynolds Tobacco Company

YES _√_ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)

YES _√_ NO ____

Lorillard Tobacco Company YES _√_ NO ___

23. Have the plaintiffs proven that the defendants' actions, beginning in January, 1954, and continuing through May 24, 1996, were a substantial factor in causing a distortion of the body of public knowledge concerning smoking and health?

YES __√__ NO _____

24. Have the plaintiffs proven that the defendants' actions, beginning in January, 1954, and continuing through May 24, 1996, were a substantial factor in causing a distortion of the body of public knowledge concerning the properties of nicotine?

YES __√__ NO _____

25. Have the plaintiffs proven that there was detrimental reliance on the distorted knowledge concerning smoking and health by an intended and foreseeable class of Louisiana citizens?

YES __√__ NO _____

- **If your answer to Question #25 is YES, answer Question #27.**

- **If your answer to Question #25 is NO, skip Question #27.**

26. Have the plaintiffs proven that there was detrimental reliance on the distorted knowledge concerning the properties of nicotine by an intended and foreseeable class of Louisiana citizens?

YES __√__ NO ____

- **If your answer to Question #26 is YES, answer Question #28.**

- **If your answer to Question #26 is NO, skip Question #28.**

27. Have the plaintiffs proven that such reliance on the distorted knowledge concerning smoking and health by the intended and foreseeable class was reasonable under the totality of the circumstances presented?

YES __√__ NO ____

28. Have the plaintiffs proven that such reliance on the distorted knowledge concerning the properties of nicotine by the intended and foreseeable class was reasonable

under the totality of the circumstances presented?

YES √ NO ____

29. Have the plaintiffs proven that such reliance by the intended and foreseeable class of Louisiana citizens on the distorted body of public knowledge concerning smoking and health caused or contributed to the need for medical monitoring and cessation of smoking programs?

YES √ NO ____

30. Have the plaintiffs proven that such reliance by the intended and foreseeable class of Louisiana citizens on the distorted body of public knowledge concerning the properties of nicotine caused or contributed to the need for medical monitoring and cessation of smoking programs?

YES √ NO ____

III. THE CLAIM OF CONSPIRACY

31. Have the plaintiffs proven that, beginning in December, 1953, and continuing through May 24, 1996, one or more of these defendants conspired with at least one other

defendant to distort the body of public knowledge concerning smoking and health and the properties of nicotine?

Philip Morris USA Inc. YES __√__ NO

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

32. Have the plaintiffs proven that, beginning in December, 1953, and continuing through May 24, 1996, a conspiracy existed between two or more of these defendants to distort the body of public knowledge concerning smoking and health and the properties of nicotine that caused or contributed to the need for medical monitoring and cessation of smoking programs?

YES __√__ NO ____

33. Have the plaintiffs proven that, beginning in December, 1953, and continuing

through May 24, 1996, one or more of these defendants conspired with at least one other defendant to create the idea that there was a controversy about smoking and health issues?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

34. Have the plaintiffs proven that, beginning in December, 1953, and continuing through May 24, 1996, a conspiracy existed between two or more of these defendants to create the idea that there was a controversy about smoking and health issues that caused or contributed to the need for medical monitoring and cessation of smoking programs?

YES __√__ NO ____

35. Have the plaintiffs proven that, beginning in December, 1953, and continuing

through May 24, 1996, one or more of these defendants conspired with at least one other defendant to refrain from conducting scientific/medical research on the relationship between smoking and disease?

Philip Morris USA Inc. YES _√_ NO ___

R. J. Reynolds Tobacco Company
YES _√_ NO ___

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES _√_ NO ___

Lorillard Tobacco Compan YES _√_ NO ___

36. Have the plaintiffs proven that, beginning in December, 1953, and continuing through May 24, 1996, a conspiracy existed between two or more of these defendants to refrain from conducting scientific/medical research on the relationship between smoking and disease that caused or contributed to the need for medical monitoring and cessation of smoking programs?

YES _____ NO _√_

IV. THE CLAIM OF BREACH OF VOLUNTARILY

ASSUMED DUTIES

37. Have plaintiffs proven that, beginning in December, 1953, and continuing through May 24, 1996, one or more of these defendants intentionally decided not to investigate and disclose the true facts known to it (them) concerning the relationship between smoking and diseases through channels other than advertising and promotion?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

- **If your answer to Question #37 is YES for any defendant, continue.**

- **If your answer to Question #37 is NO for all defendants, skip to Question #40.**

38. Have the plaintiffs proven that, by intentionally deciding, beginning in December,

1953, and continuing through May 24, 1996, not to disclose facts known to them about the relationship between smoking and disease, through channels other than advertising and promotion, one or more of these defendants caused or contributed to the need for medical monitoring and/or cessation of smoking assistance?

Philip Morris USA Inc. YES √ NO ____

R. J. Reynolds Tobacco Company
YES √ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES √ NO ____

Lorillard Tobacco Company YES √ NO ____

39. Was the defendant's (or defendants) intentional breach of its (their) voluntarily assumed duty to investigate and disclose the true facts known to it (them) concerning the relationship between smoking and disease through channels other than advertising and promotion a substantial factor in causing smokers to smoke and continue smoking?

YES __√__ NO ____

V. THE CLAIM OF MARKETING TO MINORS

40. Did one or more of these defendants, on or before May 24, 1996, intentionally breach their voluntarily assumed duty not to market their cigarettes to minors?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation) YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

- **If your answer to Question #40 is YES for any defendant, continue.**

- **If your answer to Question #40 is NO for all defendants, skip to Question #44.**

41. Did the defendant's (or defendants') intentional breach of its (their) voluntarily assumed duty not to market their products to

minors cause smokers to smoke or to continue smoking?

Philip Morris USA Inc. YES _√_ NO ___

R. J. Reynolds Tobacco Company YES _√_ NO ___

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation) YES _√_ NO ___

Lorillard Tobacco Company YES _√_ NO ___

42. Did the defendant's (or defendants') intentional breach of its (their) voluntarily assumed duty not to market their products to minors contribute to causing smokers to smoke or to continue smoking?

Philip Morris USA Inc. YES _√_ NO ___

R. J. Reynolds Tobacco Company YES _√_ NO ___

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation) YES _√_ NO ___

Lorillard Tobacco Company YES _√_ NO ___

43. Was the defendant's (or defendants') intentional breach of its (their) voluntarily

assumed duty not to market their products to minors a substantial factor in causing minors to smoke and continue smoking?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

VI. **THE CLAIM OF PRODUCT LIABILITY**

44. Have the plaintiffs proven that all of the cigarettes manufactured and sold before September 1, 1988 by any of these defendants were in normal use?

Philip Morris USA Inc. YES __√__ NO ____

R. J. Reynolds Tobacco Company
YES __√__ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES __√__ NO ____

Lorillard Tobacco Company YES __√__ NO ____

- **If your answer to Question #44 is YES for any defendant, continue.**

- **If your answer to Question #44 is NO for all defendants, skip to Question #46.**

45. Have the plaintiffs proven that all of the cigarettes manufactured and sold before September 1, 1988 by any of these defendants were defective in design?

Philip Morris USA Inc. YES ____ NO _√_

R. J. Reynolds Tobacco Company
YES ____ NO _√_

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES ___ NO _√_

Lorillard Tobacco Company YES ___ NO _√_

46. Have the plaintiffs proven that all of the cigarettes manufactured and sold after September 1, 1988 by any of these defendants were in reasonably anticipated use?

Philip Morris USA Inc. YES _√_ NO ____

R. J. Reynolds Tobacco Company
YES _√_ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)

YES _√_ NO ____

Lorillard Tobacco Company YES _√_ NO ___

- **If your answer to Question #46 is YES for any defendant, continue.**

- **If your answer to Question #46 is NO for all defendants, skip to Question #48.**

47. Have the plaintiffs proven that all of the cigarettes manufactured and sold in Louisiana after September 1, 1988 were defective in design?

Philip Morris USA Inc. YES ___ NO _√_

R. J. Reynolds Tobacco Company

YES _____ NO _√_

Brown & Williamson Tobacco _Corporation (B&W) (individually and as successor to the American Tobacco Corporation)

YES ___ NO _√_

Lorillard Tobacco Company YES ___ NO _√_

48. Have the plaintiffs proven that Gloria Scott smoked cigarettes defective in design, in normal use, manufactured by any of these defendants?

Philip Morris USA Inc. YES ___ NO √

R. J. Reynolds Tobacco Company
YES ___ NO √

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES ___ NO √

Lorillard Tobacco Company YES ___ NO √

49. Have the plaintiffs proven that Deania Jackson smoked cigarettes defective in design, in normal use, manufactured by any of these defendants?

Philip Morris USA Inc. YES ___ NO √

R. J. Reynolds Tobacco Company
YES ___ NO √

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES ___ NO √

Lorillard Tobacco Company YES ___ NO √

VII. THE CLAIM FOR MEDICAL MONITORING

50. Have the plaintiffs proven that cigarettes manufactured, and sold by any of these defendants in the state of Louisiana, are hazardous to human health?

Philip Morris USA Inc. YES √ NO ___

R. J. Reynolds Tobacco Company YES √ NO ___

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation) YES √ NO ___

Lorillard Tobacco Company YES √ NO ___

51. Have the plaintiffs proven that smoking the cigarettes manufactured by any of these defendants, and sold to consumers in Louisiana, significantly exposed smokers to proven hazardous substances?

Philip Morris USA Inc. YES √ NO ___

R. J. Reynolds Tobacco Company
YES √ NO ____

Brown & Williamson Tobacco Corporation (B&W) (individually and as successor to the American Tobacco Corporation)
YES √ NO ____

Lorillard Tobacco Company YES √ NO ___

52. Have the plaintiffs proven that as a direct result of their use of cigarettes manufactured by the defendants and sold by the defendants to consumers in Louisiana, the class suffers a significantly increased risk of contracting one or more of the following serious latent diseases related to smoking?

a. Lung Cancer YES √ NO ___

b. Bladder Cancer YES √ NO ____

c. Chronic Obstructive Pulmonary Disease YES √ NO ____

d. Cardiovascular Disease YES √ NO ____

53. Have the plaintiffs proven that the class' risk of contracting one or more of the following serious latent diseases is greater than it would have been had they not been

exposed to cigarettes manufactured and sold by the defendants in Louisiana?

a. Lung Cancer YES √ NO ____

b. Bladder Cancer YES √ NO ____

c. Chronic Obstructive Pulmonary Disease YES √ NO ____

d. Cardiovascular Disease YES √ NO ____

54. Have the plaintiffs proven that class' risk of contracting one or more of the following serious latent diseases is greater than the risk members of the public at large face with regard to the same serious latent diseases?

a. Lung Cancer YES √ NO ____

b. Bladder Cancer YES √ NO ____

c. Chronic Obstructive Pulmonary Disease YES √ NO ____

d. Cardiovascular Disease YES √ NO ____

55. Have the plaintiffs proven that a monitoring procedure exists that makes the early detection of one or more of the following serious latent diseases possible?

a. Lung Cancer YES √ NO ____

b. Bladder Cancer YES √ NO ___

c. Chronic Obstructive Pulmonary Disease YES √ NO ___

d. Cardiovascular Disease YES √ NO ___

56. Have the plaintiffs proven that the proposed medical monitoring procedure for one or more of the following serious latent diseases has been prescribed by a qualified physician?

a. Lung Cancer YES ___ NO √

b. Bladder Cancer YES ___ NO √

c. Chronic Obstructive Pulmonary Disease YES ___ NO √

d. Cardiovascular Disease YES ___ NO √

57. Have the plaintiffs proven that the proposed medical monitoring procedure for one or more of the following serious latent diseases is reasonably necessary according to contemporary scientific principles?

a. Lung Cancer YES ___ NO √

b. Bladder Cancer YES ___ NO √

c. Chronic Obstructive Pulmonary Disease YES ___ NO √

d. Cardiovascular Disease YES ___ NO √

58. Have the plaintiffs proven that the proposed medical monitoring procedure for one or more of the following serious latent diseases is of a type that a reasonable medical specialist would order for a similarly situated patient?

a. Lung Cancer YES ___ NO √

b. Bladder Cancer YES ___ NO √

c. Chronic Obstructive Pulmonary Disease YES ___ NO √

d. Cardiovascular Disease YES ___ NO √

59. Have the plaintiffs proven that the proposed medical monitoring procedure for one or more of the following serious latent diseases is different from that normally recommended for individuals in the absence of exposure to cigarettes?

a. Lung Cancer YES ___ NO √

b. Bladder Cancer YES ___ NO √

c. Chronic Obstructive

Pulmonary Disease YES ___ NO √

d. Cardiovascular Disease YES ___ NO √

60. Have the plaintiffs proven that there is some demonstrated clinical value in the early detection and diagnosis of one or more of the following serious latent diseases related to smoking?

a. Lung Cancer YES √ NO ___

b. Bladder Cancer YES √ NO ___

c. Chronic Obstructive Pulmonary Disease YES √ NO ___

d. Cardiovascular Disease YES √ NO ___

VIII. THE CLAIM FOR CESSATION OF SMOKING

61. Have the plaintiffs proven that smoking cessation methods or aids exist that will assist smokers in stopping smoking?

YES √ NO ___

- **If your answer to Question #61 is YES, continue.**

If your answer to Question #61 is NO, skip to Question #65.

62. Have such smoking cessation methods or aids been prescribed by a qualified physician?

YES √ NO ____

63. Are such smoking cessation methods or aids reasonably necessary according to contemporary scientific principles?

YES √ NO ____

64. Have plaintiffs proven that there is clinical value in such smoking cessation methods or aids?

YES √ NO ____

IX. DEFENSE OF CONSENT

65. Has any defendant proven that the class of Louisiana smokers knew that cigarettes were designed and manufactured to cause addiction, that the addiction thus caused would expose the class to significant levels of substances proven hazardous to human health, and, that the class of Louisiana smokers chose to smoke anyway?

YES ____ NO √

- **If your answer to Question #65 is YES, continue.**

- **If your answer to Question #65 is NO, skip Questions #66 and #67.**

66. Did the defendants have superior knowledge of the harmful properties of their products and induce Plaintiff Class to act without knowledge of the nature or extent of the risk?

YES _____ NO _____

67. Did the defendants have superior knowledge of the addictive properties of their products and induce Plaintiff Class to act without knowledge of the nature or extent of the risk?

YES _____ NO _____

SIGN AND DATE, THEN NOTIFY THE JUDGE YOU ARE READY TO RETURN TO THE COURTROOM.

Date: 7-28-03 Foreperson: Jacquelyn Beo

APPENDIX M

Supreme Court of Louisiana

Gloria SCOTT, et al.,

v.

The AMERICAN TOBACCO CO., INC., et al.

Nos. 2002-CC-2449, 2002-CC-2452.

Nov. 15, 2002.
Rehearing Denied Dec. 4, 2002.

Herman, Herman, Katz & Cotlar, *Russ Michel Herman, Stephen Jay Herman,* New Orleans; *Simon, Peragine,* Smith & Redfearn, *Robert L. Redfearn,* New Orleans; Gauthier, Downing, LaBarre, Beiser & Dean, *Bruce C. Dean, Deborah M. Sulzer,* Metairie; Murray Law Firm, *Stephen B. Murray, Sr., Stephen B. Murray Jr.,* New Orleans; Leger & Mestayer, *Walter J. Leger, Jr., Christine L. DeSue,* New Orleans; Bruno & Bruno, *Joseph Michael Bruno, David S. Scalia,* New Orleans; Carter & Cates,

Kenneth Michael Carter, New Orleans; St. Martin & Williams, *Michael X. St. Martin*, Houma; Fayard & Honeycutt, *Calvin Clifford Fayard, Jr.*, Denham Springs; Baggett, McCall, Burgess, *William B. Baggett*, Lake Charles; Kelly, Townsend & Thomas, *Donald G. Kelly*, Natchitoches; Holden, Harig & Guidry, *Melvin Lee" Kip" Holden*; *W. James Singleton*, Shreveport; Usry, Weeks & Matthews, *Thomas Allen Usry*, New Orleans; Bencomo & Associates, *Raul Ramon Bencomo*, New Orleans; Edwin R. Murray & Associates, *Edwin Rene Murray*, New Orleans; Gertler, Gertler, Vincent & Plotkin, *Mike Gertler, Louis Leopold Gertler*, New Orleans; Due, Caballero, Perry, Price & Guidry, *Paul H. Due'*, Baton Rouge; *Louis Joseph Roussel, III;* Sibley Law Firm, *William Hugh Sibley*; *Evan F. Trestman*, New Orleans; for Applicant (Nos. 2002-CC-2449 and 2002-CC-2452).

Adams & Reese, *Scott E. Delacroix, Charles Fenner Gay, Jr., Ronald J. Sholes, Jeffrey E. Richardson*, New Orleans; Chaffe, McCall, Phillips, Toler & Sarpy, LLP, *Carmelite Marie Bertaut*, New Orleans; Gordon, Arata, McCollam, Duplantis & Eagan, LLP, *Steven William Copley*, New Orleans; Middleberg, Riddle & Gianna, *Dominic J. Gianna*, New Orleans; Stone, Pigman, Walther, Wittmann & Hutchinson, *Stephen H. Kupperman, Phillip A. Wittmann*, for Respondent (Nos. 2002-CC-2449 and 2002-CC-2452).

KIMBALL, Justice.*

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* Retired Judge Robert J. Klees, assigned as Justice *ad hoc*, sitting for Associate Justice Chet D. Traylor, recused.

We granted certiorari in this tobacco class action litigation to determine whether the lower courts properly considered the issue of the applicability of comparative fault to plaintiffs' suit for relief in the form of a court-supervised medical monitoring and/or cessation program. Additionally, we granted certiorari to examine the validity of the trial court's amended trial plan. For the reasons that follow, we find the lower courts acted prematurely in considering the applicability of comparative fault principles to plaintiffs' claims at this point in the litigation and prior to any adjudication relating to defendants' liability for damages. Moreover, we conclude as herein discussed that Phase I of the trial should be structured to solely determine defendants' liability for all damages and any decisions regarding future Phases of this complex litigation should be withheld until such time as they become necessary and relevant.

Facts and Procedural History

As discussed in our prior decision, *Scott v. American Tobacco Co.*, 01-2498 (La.9/25/01), 795 So.2d 1176 (*Scott I*), this litigation arises from a class action filed by plaintiffs against various tobacco company defendants. Specifically, plaintiffs seek the establishment of a court-supervised medical monitoring and/or cessation program on behalf of all Louisiana residents who are or were smokers of cigarettes manufactured by defendants on or before May 24, 1996, and who desire to participate in such assistance programs.

On August 2, 2002, plaintiffs filed a Motion and Incorporated Memorandum to Exclude Allegations of or Evidence Regarding Comparative Fault. The

Motion asserted that principles of comparative fault were not applicable because the requested relief certified for class-wide treatment was not an "action for damages" pursuant to La. C.C. art. 2323. Subsequently, plaintiffs stipulated on the record that they would not proceed with a cause of action for negligence at trial.[1] After a hearing, the trial court granted plaintiffs' motion. In its reasons for judgment, the trial court indicated that comparative fault is inapplicable to plaintiffs' theories related to defendants' intentional conduct under La. C.C. art. 2323, that plaintiffs' claim for the establishment of a medical monitoring and/or cessation program is not an action for "damages" as defined in *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188 (La.7/8/98), 716 So.2d 355, and that comparative fault would be inapplicable to plaintiffs' theories of recovery under the principles set forth by this court in *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La.1985), and *Veazey v. Elmwood Plantation Associates, Ltd.*, 93-2818

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[1] According to plaintiffs, they intend to pursue the following theories of liability during the Phase I trial:

(1) the intentional breach of a voluntarily assumed duty not to market cigarettes to children;

(2) an "intentional" (for Article 2323(C) purposes) design defect claim, under both *Halphen* and the LPLA, for the manufacture of an unreasonably dangerous product (with a desire to create nicotine dependence and/or addiction, and/or with knowledge to a degree of substantial certainty that the product, when used as intended, will result in dependence and/or increased risk of developing a latent illness or disease);

(3) a claim under *Halphen* for the manufacture of products that are unreasonably dangerous per se;

(4) fraud; and

(5) conspiracy.

(La.11/30/94), 650 So.2d 712 (La.1994). On September 20, 2002, the court of appeal granted defendants' supervisory writ application and reversed the judgment of the trial court. Relying in part on this court's decision in *Gilboy v. American Tobacco Co.*, 582 So.2d 1263 (La.1991), the court of appeal concluded that comparative fault of all the parties, including plaintiffs, should be considered, even if the only theories asserted in Phase I of the trial involve issues of intentional conduct by defendants. Thus, the court of appeal held comparative fault principles to be applicable in this litigation.

At approximately the same time, defendants filed a Motion for Notice of Fundamental Trial Issues in Accordance with Defendants' Due Process Rights. In response, the trial court issued a judgment amending the Trial Plan. As to Phase I, the trial court's judgment stated:

In accordance with LACCP Art. 593.1, the Phase I trial shall adjudicate the liability of all of the defendants for all damages common to the class certified by this Court. The issues in the Phase I trial relating to liability for all damages will be fault and causation, namely:

1.) whether the defendants are responsible for the funding of the Court supervised program to monitor the medical condition of the class of Louisiana smokers to ascertain whether the smokers or former smokers may be suffering from diseases caused by, contributed to, or exacerbated by cigarette smoking;

2.) whether the defendants are responsible for the funding of a court supervised smoking cessation

program designed to assist the class of Louisiana smokers who desire to quit smoking and to prevent relapse.

After reciting these general issues, the court enumerated numerous particularized common issues of fault and causation to be tried in Phase I. Next, addressing defenses, the trial court's judgment stated, "All defenses available to defendants shall be tried." Finally, the judgment enunciated the issues to be considered in Phase II of the trial, if necessary. Defendants applied for supervisory writs, which the court of appeal granted on October 1, 2002. The court of appeal vacated the amended pre-trial order, apparently being of the belief that the trial court's order ignored the court of appeal's September 20, 2002 decision that comparative fault was applicable to plaintiffs' case.

In two separate applications, plaintiffs sought review of the court of appeal's judgments described above. This court granted certiorari and consolidated the matters. *Scott v. American Tobacco Co.*, 02-2449 (La.10/23/02), 827 So.2d 1148 and *Scott v. American Tobacco Co.*, 02-2452 (La.10/23/02), 827 So.2d 1149.

Discussion

In examining the various filings of the parties and the judgments of the lower courts, we have found that, not surprisingly, the issues in this complex class action have become intertwined and confused. Consequently, there is a need for the parties and the lower courts in this unique and difficult case to examine discrete issues as they become relevant and to manage this litigation in appropriate stages.

As explained above, the court of appeal vacated the trial court's amended pre-trial order ostensibly because it was of the opinion that, in preparing the order, the trial court ignored the court of appeal's September 20, 2002 decision regarding the applicability of comparative fault to plaintiffs' claims. We find, however, that the lower courts' rulings related to comparative fault were premature. Whether principles of comparative fault are applicable to this claim for medical monitoring and/or cessation programs and whether individual claimants' injuries were caused in part by their own conduct need not be determined until defendants' liability has been established.

Pursuant to former La. C.C.P. art. 593.1, which all parties agree applies to this case, once a class is certified, the trial court's management plan may provide for separate trials of the following issues in the following order:

(1) Liability for all damages.

(2) Determination of any item of damage common to the class and the basis for assessment thereof.

(3) Assessment of common damages on the basis determined in (2) above or on such basis as may be appropriate in the absence of any prior determination of the basis thereof.

(4) Determination and assessment of individual damages not common to the class, either in one trial or in a series of trials involving one or more members of the class.

In the instant case, we conclude that Phase I of the trial should be conducted so as to determine defendants' liability for establishing a court-

supervised medical monitoring and/or cessation program. Such a trial will include the common issues of fault and causation, which can be tried on a class-wide basis, including the *Bourgeois* factors.[2] During Phase I, defendants will have the opportunity to present any applicable class-wide affirmative defenses.

After liability has been tried in accordance with former La. C.C.P. art. 593.1, then the trial court may formulate a plan for a subsequent phase of trial in which sub-classes might be formed and more individualized issues, such as comparative fault and prescription, might be addressed. We find a trial plan of this sort will be beneficial in handling this unique and complex class action litigation and, more importantly, is one contemplated by Louisiana law as it existed at the time this action was filed. We reserve for a later day the important issue of whether comparative fault can be assessed and the effect of that assessment in cases seeking relief in the form of a court-supervised medical monitoring and/or cessation program.

Defendants have expressed concern that, based on the trial court's current order relating to the Phase II trial, they will never be afforded the opportunity to try individualized issues, including comparative fault, should an adverse verdict be rendered against them at the conclusion of the Phase

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[2] In this case, the trial court appears to be of the belief that La. C.C. art. 2315, as amended by Act No. 989 of 1999, is applicable to plaintiffs' claims. Because the issue is not before us at this time, we express no opinion as to the applicability of the amended version of Article 2315 to this litigation.

I trial. Because of our admonition that the trial court decide issues only as they become relevant and our judgment vacating the amended trial plan, including its pronouncements dealing with Phase II, we reserve discussion of defendants' concerns until a later date.

In light of the above findings, we vacate the lower courts' rulings relating to the issue of comparative fault, presented to this court in application number 02-CC-2449, as premature. Additionally, as to application number 02-CC-2452, we vacate the court of appeal's judgment pertaining to the trial court's pre-trial order and the trial court's Judgment on Motion for Notice of Fundamental Trial Issues and Reasons for Judgment, which established an amended trial plan. The matter is remanded to the trial court for further proceedings consistent with this opinion. Any request for rehearing in this matter shall be filed on or before the seventh calendar day after the mailing of the notice of judgment.

VACATED and REMANDED.

CALOGERO, C.J., concurs and assigns reasons.

VICTORY, J., concurring in part and dissenting in part, and assigns reasons. CALOGERO, Chief Justice, concurs and assigns reasons:

Although I concur in the majority's opinion and limited disposition by which the court of appeal's judgment has been reversed, I write separately in order to express my view that the opinion does not go as far as it should, mainly because it postpones a decision on the primary issue presented to this court, concluding that the issue can be decided later. I would prefer to address and decide the pivotal issue-whether the plaintiffs' entitlement to damages

caused by the defendant's intentional tortious conduct can be reduced by the plaintiffs' comparative negligence.

The two decisions from the Fourth Circuit Court of Appeal challenged by the plaintiffs are based on that court's interpretation of this court's language[1] in *Gilboy v. American Tobacco Co.*, 582 So.2d 1263 (La.1991) to "permit[ ] evidence on comparative fault of all the parties, including the plaintiffs, even if the only theories put forth in Phase I of this trial involves [sic] issues of intentional conduct by the defendants in the manufacture, labeling, and sale of cigarettes." *Scott v. American Tobacco Co.*, 2002-C-1938 (La. Ap. 4 Cir. 9/20/02).

However, the *Gilboy* decision itself says absolutely nothing about whether the plaintiffs'

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[1] The court of appeal cited the following language from *Gilboy*:

> Defendants are not entitled to a summary judgment. Multiple questions of material fact remain to be determined. Did smoking cigarettes cause plaintiff's lung and brain cancers? Are cigarettes unreasonably dangerous per se under the risk/utility test of *Halphen [v. Johns-Mansville Sales Corp.*, 484 So.2d 110 (La.1986)]? If it is established that cigarettes caused the cancers and are unreasonably dangerous per se, other factors must be weighed to apportion comparative fault. Did the manufacturers suppress health information concerning cigarettes? *See Rogers v. R.J. Reynolds Tobacco Co.*, 761 S.W.2d 788 (Tex.App.1988). How effective were the warnings? Was Gilboy competent to assume the risk of smoking when he acquired the habit? Did addiction make Gilboy's decision to continue smoking a voluntary choice? To what extent did plaintiff voluntarily encounter the risk of lung cancer? All of these considerations affect the comparative fault of the parties. The issues must be determined at trial on the merits.
>
> 582 So.2d at 1265-66.

entitlement to damages caused by the defendant's intentional tortious conduct can be reduced by the plaintiffs' comparative negligence. In fact, the *Gilboy* court simply stated that the plaintiffs were "claiming damages against cigarette manufacturers and a vendor." *Gilboy*, 582 So.2d at 1264. The only issue decided by this court in that case was whether the defendants were entitled to summary judgment because the plaintiffs "voluntarily encountered the risks associated with cigarette smoking." *Id.*

On the other hand, La. Civ.Code art. 2323(C) expressly states as follows: "[I]f a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced." Because the effective date of that provision is April 16, 1996, the defendants claim the rule should not be applied to this case, which was filed prior to that effective date. However, this court has specifically held that the changes reflected in Act 3 of the 1996 Extraordinary Session of the Louisiana Legislature, which amended La. Civ.Code art. 2323, "are procedural, and can be applied retroactively." *Keith v. U.S. Fidelity & Guaranty Co.*, 96-2075, p. 7 (La.5/9/97), 694 So.2d 180, 183.[2]

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[2] Defendants incorrectly cite *Aucoin v. State through DOTD*, 97-1938 (La.4/24/98), 712 So.2d 62, claiming that this court found in that case that the 1996 amendment to La.Code of Civ. Proc. art. 2323(B) was substantive and applies only prospectively. However, the *Aucoin* case dealt with La.Code of Civ. Proc. art. 2324(B). In fact, the *Aucoin* decision notes specifically that "[t]his court has already determined that amended article 2323 was merely procedural legislation," meaning that "it was to be applied retroactively." *Id.* at 9,712

Moreover, the rule established by the 1996 amendments to La. Civ.Code art. 2323 merely codified the prior existing law. Crawford, William E., *Commentary: The Revision of Tort Law by the Extraordinary Session of 1996.* In fact, virtually every Louisiana appellate court, including the Fourth Circuit, had applied the rule prior to 1996. *See Hattori v. Peairs,* 95-0144, p. 12 (La.App. 1 Cir. 10/6/95),662 So.2d 509, 517;*Broussard v. Lovelace,* 610 So.2d 159, 162 (La.App. 3 Cir.1992), *writ denied,*615 So.2d 343 (La.1993); *Andry v. Parish of Orleans,* 309 So.2d 814, 815 (La.App. 4 Cir.1975); *South Texas Lloyds v. Jones,* 273 So.2d 853 (La.App. 2 Cir.1973). The only generally recognized exception to the rule was assault and battery cases in which the complainant had provoked the defendant's actions. *See Clark v. Burchard,* 00-2750 (La.App. 4 Cir. 11/14/01), 802 So.2d 824;*Robinson v. Hardy,* 505 So.2d 767 (La.App. 2 Cir.1987), *writ denied,*508 So.2d 825 (La.1987); *Jones v. Thomas,* 557 So.2d 1015 (La.App. 4 Cir.1990).

This court's decisions in *Veazey v. Elmwood Plantation Associates, Ltd.,* 93-2818 (La.11/30/94), 650 So.2d 712 and *Bell v. Jet Wheel Blast,* 462 So.2d 166 (La.1985), did not modify the general rule that a plaintiff's entitlement to damages caused by the defendant's intentional tortious conduct cannot be reduced by the plaintiff's comparative negligence. In fact, neither of those case directly addressed the question presented by this case. In *Veazey,* this court

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So.2d at 68. The fact that this court did not distinguish between the subsections of amended La. Civ.Code art. 2323 has been expressly recognized in *Johnson v. First Nat. Bank,* 2000-870, p. 34 (La.App. 3 Cir. 6/20/01),792 So.2d 33, 57.

found that the liability of a negligent tortfeasor could be reduced by the fault of an intentional tortfeasor **in some circumstances**. Two obvious distinctions exist between *Veazey* and the instant case: 1) *Veazey* involved the liability of two tortfeasors, one negligent and one intentional; and (2) *Veazey* does not address the comparison of victim fault with the fault of a tortfeasor of any type. In *Bell*, this court merely found that comparative fault principles could be applied in products liability cases under some circumstances. Again, the question of comparing the liability of an intentional tortfeasor with victim fault did not arise.

Further, even if the principles articulated in *Veazey* and *Bell* could somehow be applied to the instant case, the Court of Appeal's conclusion that comparative fault applies to the instant case is nevertheless at variance with the law. As the Court of Appeal noted, *Veazey* and *Bell* "specifically recognize that comparative fault, **under certain circumstances**, may apply in product liability/intentional tort cases." *Scott*, 02-C-1938, p. 1 (emphasis added). In both *Veazey* and *Bell*, this court held that a case-by-case analysis is necessary to determine whether application of comparative fault principles is appropriate in a given situation. *Veazey*, 93-2818 at 10-11; 650 So.2d at 718-719; *Bell*, 462 So.2d at 171-72. In both of those cases, this court found that comparative fault principles should not apply under the facts and circumstances of those cases. An important reason for that decision in Bell was this court's recognition of the following fact:

Reduction of the plaintiff's award in this type of case would only tend to defeat the basic goals of

strict products liability doctrine by reducing economic incentive for product quality control and by forcing the injured individual to underwrite a loss himself which could be more efficiently distributed by the manufacturer through insurance and price adjustments.

462 So.2d at 172. Similarly, in *Veazey*, this court noted as follows:[I]n the area of strict liability, though we have repeatedly held that comparative fault principles generally apply in strict liability cases involving victim fault, we have also consistently maintained that application of comparative fault principles to allocate fault between an injured plaintiff and the party with *garde* or custody of the property or object producing the harm in a particular case depends in part upon the court's determination of whether reducing the injured party's recovery through a comparative fault allocation will serve as an incentive for a similarly situated person to exercise care or, in contrast, operate to reduce the incentive of the owner of the thing at issue to remove the risk of harm.

93-2818 at 10, 650 So.2d at 718. The court also recognized in *Veazey* the following: "Because we believe that intentional torts are of a fundamentally different nature than negligent torts, we find that a true comparison of fault based on an intentional act and fault based on negligence is, in many circumstances, not possible." *Id.* at 12, 650 So.2d at 719-20.

In the instant case, the plaintiffs claim that the defendants intentionally designed, manufactured, and marketed their products in a manner that made cigarettes more harmful and more addictive, desiring

that the plaintiffs would become dependent, even though they knew with substantial certainty that smokers would become dependent and suffer an increased risk of harm. Given the allegations that the defendants acted intentionally in such a way as to reduce the plaintiffs' ability to make a free choice concerning their actions, this would appear to be exactly the type of case in which the application of comparative fault principles would not be appropriate under the principles enunciated in *Bell* and *Veazey*. Certainly any incentive the defendants would have to change their intentional conduct would be reduced by the application of comparative negligence principles in this case. Perhaps more importantly, this case would appear to be exactly the type of case in which a true comparison of fault would be impossible because the actions of the parties were "fundamentally different." *Veazey*, 93-2818 at 12; 650 So.2d at 719. Accordingly, I would go further than the majority decision (in which I concur) and address the court of appeal's finding that comparative fault principles may be applied to reduce the plaintiffs' entitlement to damages caused by the defendant's intentional tortious conduct. Were the court now addressing that issue, I would hold that comparative fault principles may not be applied for that purpose.

I would also reject the defendants' argument that La. Civ.Code art. 2323(C) does not apply to this case because the plaintiffs themselves committed intentional acts. In support of their assertion, the defendants cite *Clark*, 00-2750, 802 So.2d 824, in which the court made the blanket statement that La.Code of Civ. Proc. art. 2323(C)"does not apply where the plaintiff's fault is intentional in nature."

00-2750 at 15, 802 So.2d at 834. However, as noted above, the *Clark* case simply applies the rule that comparative fault principles do apply in battery cases when the victim intentionally provoked the attack. Because of the obvious factual distinctions, the statement in *Clark* does not apply in a case like this.

Second, and more importantly, my review of clearly-established principles of Louisiana law suggests to me that the plaintiffs' alleged conduct in this case does not qualify as "intentional acts," although I prefer to reserve final judgment on that issue pending review of all the evidence presented at trial. Under this court's most recent pronouncement on the subject, a party has committed an intentional act only when one of two things is true: (1) the actor "consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct"; or (2) the actor "knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result." *Cole v. Department of Public Safety & Corrections,* 2001-2123, p. 30-31 (La.9/4/02), 825 So.2d 1134, 1140.[3]

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[3] Like most of the Louisiana jurisprudence considering whether a party has committed an intentional tort, *Cole* involved an attempt by an employee to avoid the exclusivity provisions of the Louisiana Workers' Compensation Act, as allowed by La Rev. Stat. 23:1032(B), by asserting that his injury was caused by his employer's intentional, as opposed to negligent, acts. However, this court noted in *Reeves v. Structural Preservation Systems,* 98-1795 (La.3/2/99), 731 So.2d 208, that an "intentional act" for purposes of La.Rev.Stat. 23:1032(B) means the same as "intentional tort" in reference to civil liability. *See Cole,* 2001-2123 at p. 30,825 So.2d at 1140. Thus, the principles

The defendants do not allege either of these things in this case, but argue simply that their comparative fault defense is based on "evidence demonstrating plaintiffs' knowing and voluntary choices to smoke and continue smoking despite their belief that smoking was dangerous and addictive." It is well established that "mere knowledge and appreciation of a risk does not constitute intent." *Reeves v. Structural Preservation Systems*, 98-1795, p. 9-10 (La.3/12/99), 731 So.2d 208, 213. Likewise, even gross negligence does not meet the intentional act requirement. *See In re Hunter*, 2002-1975, p. 21 (La.8/19/02), 823 So.2d 325, 339.

For the reasons set forth above, I would prefer to answer the primary question presented by this case and find that the court of appeal erred in deciding that comparative fault principles could be applied to reduce the plaintiffs' entitlement to damages caused by the defendant's intentional tortious conduct in this case. Accordingly, I concur in the decree in the majority opinion.

VICTORY, J., concurring in part and dissenting in part.

I concur that Phase I of this trial should be conducted so as to determine defendants' liability, solely as a result of its intentional conduct as alleged by plaintiffs, for establishing a court-supervised medical monitoring and/or cessation program. I further concur that Phase I of this trial will include the common issues of fault and causation, and that defendants will have the opportunity to present any

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enunciated in *Cole* and other workers' compensation cases apply to determination of whether the plaintiffs in this case committed intentional tortious acts.

applicable class-wide defenses, including affirmative defenses.

Among other defenses, defendants contend that plaintiffs voluntarily chose to smoke with the knowledge and the personal belief that smoking caused disease, was deadly and addictive. In fact, since 1966, every pack of cigarettes contained the warning: "Caution: Cigarette Smoking May Be Hazardous To Your Health." On April 1, 1970, the warning on cigarette packages was changed to: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." Since 1985, every package of cigarettes has contained the following warning: "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema And May Complicate Pregnancy." These are the very diseases for which plaintiffs now seek medical monitoring costs as a class. Clearly, evidence that the plaintiffs, as a class, were warned that smoking caused these deadly diseases and chose to smoke in spite of this danger is relevant to the common issues of fault and causation and constitutes an applicable class-wide defense under this Court's per curiam opinion.

By way of dissent, it is my view that the Court should rule at this time that defendants can present, at Phase II, evidence of an individual's comparative fault. Contrary to plaintiffs' assertions, La. C.C. art. 2323(C)[1] does not apply to this case to exclude

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[1] La. C.C. art. 2323(C) provides:

Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional

evidence of plaintiffs' fault because their "fault" in voluntarily choosing to smoke in spite of knowledge of the risks is not negligent or accidental, but is intentional. La. C.C. art. 2323(C) applies only when a plaintiff's contributory fault consists of negligence, not when a plaintiff's fault is intentional in nature. *See Clark v. Burchard,* 00-2750 (La.App. 4 Cir. 11/14/01), 802 So.2d 824;*Landry v. Bellanger,* 00-2029 (La.App. 1 Cir. 3/28/02), 813 So.2d 598. In addition, contrary to Chief Justice Calogero's concurring opinion, plaintiffs' fault does not have to meet the definition of an "intentional tort," in order to fall outside the exclusionary language of La. C.C. art. 2323(C). Defendants have not alleged, nor do they have to prove, that plaintiffs committed an "intentional tort" by voluntarily choosing to smoke cigarettes in spite of the well-known risks, only that their conduct was intentional, and not accidental or involuntary.

Further, under the LPLA and *Halphen v. Johns-Manville Sales Corp.,* 484 So.2d 110 (La.1986), which claims are presented in this case, a plaintiff's fault can be compared with a defendant's strict liability. In *Gilboy v. American Tobacco Co.,* 582 So.2d 1263 (La.1991), this Court expressly held that comparative fault was available to a tobacco company where the plaintiff asserted a *Halphen* unreasonably dangerous per se claim, started smoking as a minor, claimed to be addicted, and claimed defendants suppressed information about smoking-some of the identical claims asserted by plaintiffs here. This Court unequivocally held that

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tortfeasor, his claim for recovery of damages shall not be reduced.

comparative fault and other issues concerning the choices plaintiffs make about smoking are for the jury to consider, and "must be determined at trial on the merits." 582 So.2d at 1265-66. Barring all evidence of comparative fault-and thus plaintiffs' own acts-is not permitted by *Gilboy*. Further, comparative fault is routinely applied to LPLA claims. *See e.g., Kampen v. American Isuzu Motors*, 157 F.3d 306, 316 (5th Cir.1998); *Tolliver v. Naor*, 99-0586, 2001 WL 1356264 (E.D.La.11/2/01); *Bayerische Motoren Werke, A.G.*, 96-2034, 1997 WL 106716 (E.D.La.3/11/97); *Simon v. American Crescent Elevator Co.*, 99-2058 (La. 4 Cir. 4/26/00),767 So.2d 64,*writ denied*,00-1974 (La.11/13/00), 773 So.2d 726; and others.

In addition, the holding of *Veazey v. Elmwood Plantation Associates, Ltd.*, 93-2818 (La.11/30/94), 650 So.2d 712 does not preclude such a result. The issue in *Veazey* was whether the defendant apartment complex could reduce its liability to the plaintiff by assessing the comparative fault of the plaintiff's rapist. Policy considerations led this Court to find that the defendant "should not be allowed to benefit at the innocent plaintiff's expense by an allocation of fault to the intentional tortfeasor under comparative fault principles." 650 So.2d at 719-20. Here, defendants argue that plaintiffs' intentional conduct constitutes relevant evidence of comparative fault between plaintiffs and defendants. As noted expressly by this Court the *Veazey* holding does not apply to such a situation:

We therefore need not, and do not, express any opinion in this case as to whether, or in what

situations, if any, victim fault should be compared to the fault of an intentional tortfeasor.

Id. at 719, n. 10.

Finally, in *Banks v. New York Life Ins. Co.*, 98-0551 (La.7/22/99), 737 So.2d 1275, this Court held that comparative fault can be used as a defense in an intentional tort case involving claims of fraud and misrepresentations, claims which are also alleged in this case. In *Banks*, this Court held that defendants could raise comparative fault based on plaintiffs' failure to properly review a life insurance policy, even though defendants allegedly deceived plaintiffs regarding the benefits of the policy. This Court explained that:

The conduct of many of the named plaintiffs in this case demonstrates their own comparative fault could reduce or even eliminate the potential for recovery. Some were sophisticated life insurance buyers, while others admitted they failed to read their policies and pay attention to the illustrations given to them by their agents.

737 So.2d at 1283. In fact, the comparative fault of the plaintiffs was one factor the Court relied on in decertifying the class because there were too many individual issues affecting defendants' liability to find that common issues predominated. 737 So.2d at 1283.

For all of the above reasons, I respectfully concur in part and dissent in part.

APPENDIX N

Court of Appeal of Louisiana,
Fourth Circuit

Gloria SCOTT and Deania M. Jackson, et al.

v.

The AMERICAN TOBACCO COMPANY, et al.

No. 98-CA-0452

Nov. 4, 1998.
Rehearing Denied March 1, 1999.

*Robert L. Redfearn,*Simon, Peragine, Smith & Redfearn, New Orleans, Louisiana, and *Wendell H. Gauthier,* Gauthier, Downing, LaBarre, Beiser & Dean, Metairie, Louisiana, and *Stephen B. Murray,* Murray Law Firm, New Orleans, Louisiana, and *Walter J. Leger, Jr.,* Leger & Mestayer, New Orleans, Louisiana, Attorneys for the Plaintiffs/Appellees.

Phillip A. Wittmann, Stephen H. Kupperman, Stone, Pigman, Walther, Wittmann & Hutchinson, New Orleans, Louisiana, and *Jerome R. Doak, Margaret I. Lyle,* Jones, Day, Reavis & Pogue, Dallas, Texas, and *Scott F. Delacroix, Charles F. Gay, Jr., Deborah B. Rouen,* Adams and Reese, L.L.P., New Orleans, Louisiana, and *Gary R. Long, James P. Muehlberger, Jennifer L. Brown,* Shook, Hardy & Bacon, L.L.P., Kansas City, Missouri, and *Steven W. Copley, John M. McCollam,* Gordon, Arata, McCollam & Duplantis, L.L.P., New Orleans, Louisiana, and *Charles W. Schmidt, III, C. Edgar Cloutier, III,* Christovich & Kearney, L.L.P., New Orleans, Louisiana, and *Charles L. Chassaignac, Carmelite M. Bertaut,* Chaffe, McCall, Phillips, Toler & Sarpy, L.L.P., New Orleans, Louisiana, and *Richard A. Schneider, Michael R. Powers, King & Spalding,* Atlanta, Georgia, and *Alan H. Goodman, Thomas M. Benjamin,* Lemle & Kelleher, L.L.P., New Orleans, Louisiana, and *Joy G. Braun, John W. Hite, III,* Sessions & Fishman, L.L.P., New Orleans, Louisiana, and *D. Scott Wise, Vincent Chang,* Davis, Polk & Wardwell, New York, New York, Attorneys for Defendants/Appellants.

Court composed of Judge WILLIAM H. BYRNES, III, Judge JOAN BERNARD ARMSTRONG, Judge JAMES F. McKAY, III.

BYRNES, Judge.

Defendants,[1] all cigarette manufacturers, appeal a judgment certifying a class action, defining the members of the class, designating the two named plaintiffs herein as the representatives of that class, naming an interim plaintiffs' committee, providing for notice to the putative class, and dismissing all cigarette distributor defendants.[2] This appeal is limited to those portions of the April 16, 1997 judgment granting plaintiffs' motion for class certification and definition of the class. We affirm.

The judgment of April 16, 1997 ordered that:

a class be certified herein defined as all Louisiana residents who are or who were smokers on or before May 24, 1996, of cigarettes manufactured by the defendants, who desire to participate in a program designed to assist them in the cessation of

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[1] Defendants-appellants were listed as: American Brands, Inc. (now known as Fortune Brands, Inc.); BATUS Holdings Inc., BATUS Inc., Brown & Williamson Tobacco Corporation, for itself and for the entity named as The American Tobacco Company (to which Brown & Williamson Tobacco Corporation is the successor by merger); Lorillard, Inc.; Lorillard Tobacco Company; Loews Corporation; Philip Morris Companies Inc.; Philip Morris Incorporated; R.J. Reynolds Tobacco Company; RJR Nabisco Inc.; Tobacco Institute, Inc.; UST Inc.; and United States Tobacco Company.

[2] The question of the dismissal of the cigarette distributors is the subject of a separate appeal under the same title as the instant case, but numbered 98-CA1973 and decided contemporaneously herewith.

smoking and/or to monitor the medical conditions of class members to ascertain whether they may be suffering from diseases caused by, contributed to, or exacerbated by the habit of cigarette smoking, provided the class member alleges that he or she commenced smoking before September 1, 1988 or that one or more defendants actively or intentionally engaged in a course of conduct designed to undermine or eliminate compliance with or attention to warnings on cigarette packaging.

The judgment states that the "Court hereby reserves unto plaintiffs and members of this defined class the right to assert any claims for damages they may have sustained as a result of smoking cigarettes."

The defendants contend that the trial court erred in certifying the class certification based on the following claims:

(1) Neither federal nor Louisiana law permits class certification of long-term, product liability, mass tort classes where individual issues predominate;

(2) The federal district court denied class certification to the same two named plaintiffs in *Castano v. American Tobacco Company*, 84 F.3d 734 (5 Cir.1996);

(3) The trial court ignored the individual issues, including causation, reliance and affirmative defenses, which are necessary to prove liability;

(4) The trial court failed to consider how to comply with choice-of-law requirements, or recognizing that the application of the varying laws of different states would defeat the predominance

and manageability requirements for class certification;

(5) The trial court failed to define the class subjectively, and mistakenly provided for a reservation of rights that destroys judicial efficiency and the res judicata effect of a judgment; and

(6) Certification of the class is erroneously based on novel, untested theories and immature torts.

The judgment certifying the class in this case is appealable. *Eastin v. Entergy Corp.*, 97-1094 (La.App. 5 Cir. 4/15/98), 710 So.2d 835. A trial court has great discretion in deciding whether to certify a class, and its decision will not be overturned absent manifest error. *Adams v. CSX Railroads*, 92-1077 (La.App. 4 Cir. 2/26/93), 615 So.2d 476.

In the present case at the time that the action was filed in June 1996, La. C.C.P. arts. 591 and 592 provided that the basic requirements of a class action included:[3]

(1) A class so numerous that joinder is impracticable;

(2) The joinder of parties who are members of the class and who are able to prove adequate representation for absent members;

(3) A "common" character among the rights of the representatives of the class and the absent class members.

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[3] Acts 1997, No. 839 Sec. 1 amended La. C.C.P. arts 591-594 and 596, and repealed article 591.1. The act provided that the amended provisions are applicable only to actions filed on or after its effective date, i.e., July 1, 1997.

Andry v. Murphy Oil, U.S.A., Inc., 97-0793-97-0800 (La.App. 4 Cir. 4/1/98), 710 So.2d 1126,*writ denied*,98-1158 (La.6/19/98), 720 So.2d 1213,*writ denied*,98-1178 (La.6/19/98), 720 So.2d 1214, and *writ not considered*, 98-1204 (La.6/19/98), 719 So.2d 473.

Certification of the class in this case is proper because it essentially boils down to one fundamental question: Is a cigarette that contains nicotine a defective product? There should be one answer to this question, and the only practical vehicle that can effectively arrive at one consistent answer is the class action procedure.

Ford v. Murphy Oil U.S.A., Inc., 96-2913 (La.9/9/97), 703 So.2d 542, and *Castano v. American Tobacco Co.*, 84 F.3d 734 (5 Cir. La.1996), are the two cases having the most bearing on the outcome of the instant case. Of the two, *Ford*, as the most recent pronouncement by the Louisiana Supreme Court on the question of class action certification, is controlling.

Ford admonishes us that historically, certification of mass tort litigation classes has been disfavored. *Id.*, p. 15; 703 So.2d at 550. We are also admonished in *Ford*, quoting from *Castano*, that:

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

In addition to skewing trial outcomes, class certification creates insurmountable pressure on

defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.

Ford, p. 15; 703 So.2d at 550.

Ford denied class certification. The class in *Ford* consisted of residents in the vicinity of four petrochemical plants who alleged injury as result of a "synergistic accumulation or combination" of "continuous emissions, combined and individual," which caused varying individual damages to the defendants. *Id.* at 543. Thus, *Ford* dealt not only with a combination of substances emitted by different defendants, but combinations that according to the plaintiff class' own allegations might involve different combinations for every member of the supposed class as well as effects that would have been different for each member of the class.

In the instant case we are concerned basically with one substance only, nicotine, and one effect only, addiction. Therefore, *Ford* is distinguishable from the instant case. We find that the reasoning in *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612 (La.1984), is applicable to the instant case where the court held that it did not matter that each member of the class was not harmed on the same date or sustained the same amount of injury. Tracing the complaint of the class in the instant case to a single source, nicotine, is consistent with the admonition found in Ford that "only mass torts 'arising from a common cause' . . . may be appropriate for class certification . . ."*Id.*, 703 So.2d at 550.

The *Ford* court objected to the "synergy" theory as a novel and untested theory of law. The instant case relies on proving the addictive qualities of nicotine, which, although apparently never proved before in a reported opinion as a matter of fact does not rely upon any novel theories of law. *Ford* refers to *Castano* in its rejection of novel theories of law, but *Castano* appears to involve more of a novel theory of fact. We are not persuaded by *Castano* on this point, which as explained later in this opinion was not the primary factor upon which the *Castano* court based its decision. We assume that the facts of many, if not most cases, are distinguishable in some way, and the *Castano* reasoning, if carried to its logical conclusion, would eliminate class actions altogether. We find it significant that *Castano* alluded to no authority in support of its novel theory about novel theories.

We prefer the reasoning of the Louisiana Supreme Court in *Ford* where the Court stated that:

> Plaintiffs [sic] "synergy theory" is novel and untested.
>
> Whether a cause of action against more than one defendant can be sustained under C.C. arts. 667-669 has never been decided. [Footnote omitted.] Furthermore, it is unclear whether plaintiffs can prove that the emissions of the four defendant companies (or the two remaining defendant companies) indeed do combine "synergistically" to cause damage to their surrounding neighbors. Thus, it is unclear what common issues of law or fact will exist in such a case and thus it is unproven whether trying the case as a class action would be superior to

trying the case in several individual or consolidated actions.

Id., p. 16; 703 So.2d at 551.

Unlike *Ford*, in the instant case the plaintiffs are not urging a novel legal theory, and there are clear common issues of fact surrounding the questions of nicotine addiction in dramatic contrast to the factual confusion that existed in *Ford* where the plaintiffs were exposed to different combinations of emissions with potentially unlimited permutations and combinations of effects and damages. To repeat, in the instant case we are talking about basically one substance, nicotine, and basically one effect, nicotine addiction.

Castano rejected the certification of a class for nicotine addiction. However, that refusal to certify was based primarily on what the *Castano* court viewed as the virtually insurmountable problems that would be posed by trying to conduct such litigation on a national basis. That problem is minimized in the instant case by limiting the class to Louisiana residents only. Moreover, the *Castano* court noted that:

The most compelling rationale for finding superiority in a class action-the existence of a negative value suit-is missing in this case. . . .

* * *

First, individual damage claims are high, and punitive damages are available in most states.

Id., at 748.

In making this observation the *Castano* court relied upon *In Re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7 Cir. Ill.1995), where it was noted that each

plaintiff was likely to recover millions of dollars. In the instant case, where the potential recovery is limited to monitoring and does not include a claim for punitive damages, we find that the most compelling rationale for superiority of the class action has been met. We see no other economically reasonably feasible way for the members of the class to pursue this litigation.

In *Eastin v. Entergy Corp.*, 97-1094 (La.App. 5 Cir. 4/15/98), 710 So.2d 835, the Fifth Circuit reversed the class action certification where employees of Entergy Corporation and some of its subsidiaries claimed that they were unlawfully discharged because of their ages. That court found a lack of commonality because the sample plaintiffs worked for Entergy, LP & L or NOPSI, or subsidiaries in different departments with different evaluation processes, which created individual and particular issues. The appellate court stated: "as defined the class included all persons in the protected age group *whose employment terminated* including those who left because of normal voluntary retirement or to obtain other employment, or for health or other reasons having nothing to do with the cause of action before the court. . . . In the case before us, the *causation* of the various claims regarding discharge of the employee are varied, and as pointed out above, sometimes *not even apparent*." *Id.* at 841.

In the present case, the complaint can be traced to a single source, nicotine, and to one effect, addiction. Liability is derived from a common theory. Proof of the addictive quality of nicotine is essential in the claims of all the plaintiffs so that there is a common character among the rights of the

representatives and the absent members of the class for a proper class action.

In *Andry v. Murphy Oil, U.S.A., Inc.*, 97-0793-97-0800 (La.App. 4 Cir. 4/1/98), 710 So.2d 1126,*writ denied*,98-1158 (La.6/19/98), 720 So.2d 1213,*writ denied*,98-1178 (La.6/19/98), 720 So.2d 1214, and *writ not considered*, 98-1204 (La.6/19/98), 719 So.2d 473, this court upheld the certifying a class action involving claims filed in relation to fire, explosion and emissions at an oil refinery which occurred when employees attempted to restart units which had shut down due to a short circuit at a physical plant in Meraux, Louisiana.

This court found that initially, "because of the potentially large number of *de minimis* claims, a class would allow access to the courts for claimants who ordinarily might not be able to litigate due to the relative size of their claims when compared with the expense of litigation." *Id.* at 1130.

Secondly, "the claims of the persons specified as class representatives equally represent a cross-section of the claims made." *Id.* This court noted:

> . . . The claims asserted by the class representatives include claims for evacuation, inconvenience, mental anguish and suffering, fear, anxiety, emotional distress, and economic damages for broken windows, removal of soot and debris, medical expenses, and business interruption. Although a claim by a particular class representative with regard to the exact damage claimed may not be typical, the class of damages asserted by each representative is. We, therefore, find nothing in the record to support the defendants' argument that the

class representatives will not adequately represent the absent class members.

Id. at 1130-31.

Thirdly, the common character requisite which requires that the party seeking a class action certification must establish that questions of law and fact are common to the members of the class must dominate over individual members. Class actions are limited to cases in which it would achieve economics of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Id.* at 1131.

In *Andry* this court distinguished Ford, supra, noting that Ford involved a class of plaintiffs suing four different and distinct entities, claiming that the emissions and pollutants each entity released into the environment over a period of time had a synergistic, damage-causing impact on the community. In Ford, the Louisiana Supreme Court concluded that the nature of the claims would require that each class member prove different facts to establish that the defendants' liability, either individually or combined, caused plaintiffs specific damages on specific dates. The case was complicated by the widely divergent types of damages involved.

The *Andry* court found that:

a common character of right exists among the claims asserted herein. This case involves a common disaster, and the alleged liability of the defendants is derived from the same theories of liability. There are no material variations in the elements of the claims of the various categories of class members. Although there obviously are individual questions of quantum,

this does not preclude a class action where, as here, predominant liability issues are common to the class.

Id. at 1151.

Andry supports this court's finding previously noted in the present case that the complaint of the class is traced to a single source, nicotine, which is consistent with a mass tort arising from a common cause. Plaintiffs assert that the defendants' liability is caused by the singular act of the tobacco industry in selling a defective product after concealing the addictive nature of nicotine. A class action is the most effective way to efficiently and economically handle this claim. Although there obviously are individual questions of quantum, this does not preclude a class action where, as here, predominant liability issues are common to the class.

In *Bourgeois v. A.P. Green Industries, Inc.*, 97-3188 (La.7/8/98), 716 So.2d 355, the Louisiana Supreme Court found that asymptomatic employees who had significant occupational exposure to asbestos and had to bear the expense of periodic medical examinations to monitor the effects of that exposure, suffered "damage," and therefore could bring an action to collect cost of medical monitoring.

The Supreme Court stated:

[W]hen a defendant's tortious act causes someone bodily harm and that person is made to incur medical expenses as a result, the law clearly affords recovery for these expenses. *Hansen [v. Mountain Fuel Supply Co.*, 858 P.2d 970] at 976;*Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287, 311 (N.J.1987). The reason these expenses are recoverable, however, is because defendant's fault caused plaintiff to incur them. This reasoning applies

as persuasively to plaintiffs who have suffered physical injury as it does to those who have not. In either case, a plaintiff has suffered legal detriment in the form of costly medical bills. *Hansen,* 858 P.2d [at] 977. Because a plaintiff's liability for the bill will be same regardless of whether he or she manifest a physical injury, it makes little legal sense to compensate one plaintiff and not the other. Hence, as long as a plaintiff can demonstrate a need for medical testing arising out a defendant's tortious act, it logically follows that the defendant should make the plaintiff whole by paying the cost these examinations. *Friends For All Children, Inc. v. Lockheed Aircraft Corp.,* 746 F.2d 816, 826 (D.C.Cir.1984).

Id. at pp. 3-4, 359.

The Louisiana Supreme Court concluded that:

the reasonable cost of medical monitoring is a compensable item of damage under Civil Code article 2315, provided that a plaintiff satisfies the following criteria: [N14]

(1) Significant exposure to a proven hazardous substance.

Exposure, as used in this factor means ingestion, inhalation, injection or absorption into the body by some other means. . . .

(2) As a proximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

No particular level of quantification is necessary to satisfy the requirement of increased risk. *Hansen,* 858 P.2d at 979. The injury in question is plaintiff's demonstrated need for medical monitoring and the

costs which correspond to such care. Hence, plaintiff need not prove a certain probability of actually suffering physical harm because of his or her exposure. It is sufficient that plaintiff show a significant degree of increased risk. Id. In addition, plaintiff must prove that the illness, the risk of which has been increased by exposure, is both serious and latent. By this we mean an illness that is dormant and, in its ordinary course, may result in significant impairment or death. *Id.*

(3) Plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease.

* * *

(4) A monitoring procedure exists that makes the early detection of the disease possible.

* * *

(5) The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles.

* * *

(6) The prescribed monitoring regime is different from that normally recommended in the absence of exposure.

* * *

(7) There is some demonstrated clinical value in the early detection and diagnosis of the disease.

Id. at pp. 4-5, 361.

In Footnote 2, the Supreme Court noted that:

the trial judge explicitly limited the claims under consideration to those of plaintiffs who have not been diagnosed with an asbestos related injury or disease, **noting that it ultimately may be proper to exclude physically injured plaintiffs from the class.** Consequently, for the purposes of this opinion, we will focus on plaintiffs' claims for medical monitoring expenses only as they relate to individuals seeking a postexposure, presymptom remedy. Defendants do not dispute the viability of a claim for future medical monitoring expenses by those plaintiffs already diagnosed with an exposure related disease.

Id. at 7, 357.[Emphasis added.]

In Footnote 12, the Supreme Court recognized that:

To prevent confusion, we note that **a claim for recovery of medical monitoring expenses is separate and distinct from a claim for the enhanced risk of contracting a serious illness due to exposure.** The enhanced risk claim seeks a damage award, not because of any expenditure of funds, but because a plaintiff contends that the unquantified injury to his or her health and life expectancy should be presently compensable, even though no evidence of disease is manifest. *Mauro v. Raymark Indus., Inc.*, 116 N.J. 126, 561 A.2d 257, 262-63 (N.J.1989). While this type of claim is inherently speculative, forcing courts to anticipate the probability of future illness or disease, a medical monitoring claim is much less so, the only issue for the factfinder being whether or not the plaintiff needs medical surveillance given the circumstances of his or her exposure. *In re Paoli R.R. Yard PCB*

Litig., 916 F.2d 829, 851 (3 rd Cir.1990). The risk of speculation in a medical monitoring claim is further reduced because recovery is based upon the specific dollar costs of reasonable and necessary periodic examinations. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795, 825 (Cal.1993).

Id. at 8, 359.

In *Bourgeois*, Footnote 15, the Supreme Court asserted that: "Recognition of a plaintiff's need for medical monitoring does not create a new tort." *Id.* at 9, 363.In his concurrence, Chief Justice Calogero agreed "that a claim for medical monitoring is a valid cause of action under Louisiana law." *Id.* at 6. The Supreme Court found that plaintiff's recovery of medical monitoring costs must be both reasonable and limited in duration to the maximum latency period. With respect to plaintiffs' claim for damages based on medical monitoring in the present case, the above requirements apply.

In his concurrence Justice Lemmon stated:

Under a duty-risk analysis, the defendants had a duty not to expose the plaintiffs to products that were unreasonably dangerous because of their asbestos content. For purposes of the exception of no cause of action, the defendants breached that duty, and the conduct constituting a breach of duty was a cause-in-fact of damages sustained by the plaintiffs. [Fn omitted.]

The fourth element of the duty-risk analysis is, at least in this case, **largely a policy question**-whether the duty imposed on the defendants not to expose the plaintiffs to these substances encompasses the risk that the plaintiffs may be

required to undergo medical monitoring to facilitate early detection and possibly successful treatment of a disease that medical science at this stage cannot accurately predict will ensue. Because of the devastating consequences which often result from significant exposure to asbestos and the long-term latency of the serious diseases caused by asbestos, the reasonable cost of necessary medical monitoring should fall within the scope of liability for the defendant's breach of duty.

Id. at 6, 362.[Emphasis added.]

A cause of action for medical monitoring based on the claim that material containing asbestos is a defective product, which defect was concealed by defendants, and which could cause serious diseases after significant exposure, is comparable to the present plaintiffs' cause of action for medical monitoring based on the claim that a cigarette containing nicotine is a defective product, which defect was concealed by the defendants, and which could cause serious diseases after significant exposure.

In the present case, we conclude that in accordance with Bourgeois, as a matter of policy, because of the devastating consequences which often result from significant exposure to addictive nicotine in cigarettes, as well as the long-term latency of the serious diseases caused by nicotine, the reasonable cost of necessary medical monitoring should fall within the scope of defendants' liability. The program for medical monitoring should include not only a plan for monitoring the effects of nicotine in causing serious diseases but should also be designed to assist addicted smokers in cessation of smoking because it

is fundamentally necessary where the product contains a substance, nicotine, which causes dependency.

In arguing that the judgment's reservation of plaintiffs' rights creates judicial inefficiency and prevents the application of res judicata to a final judgment, the defendants referred to *Small v. Lorillard Tobacco Co., Inc.*, 07112 (N.Y.7/16/98), 252 A.D.2d 1, 679 N.Y.S.2d 593. That case stated that: "Under New York's transactional approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transactions are barred, even if based on a different theory or seeking a different remedy." *Id.* at p. 5, 679 N.Y.S.2d at 601. Defendants assert that by limiting the remedy to medical monitoring, the case inadequately represented the class and impermissibly split the causes of action.

La. R.S. 13:4323 provides in pertinent part:

Sec. 4232. **Exceptions to the general rule of res judicata**

A. A judgment does not bar another action by the plaintiff:

(1) When exceptional circumstances justify relief from the res judicata effect of the judgment;

(2) When the judgment dismissed the first action without prejudice; or

(3) When the judgment reserved the right of the plaintiff to bring another action. [Emphasis added.]

The 1990 Comment to this statute further states:

. . . First, [R.S. 13:4232] gives the court the discretion to grant relief from the judgment for exceptional circumstances. This discretion is

necessary to allow the court to balance the principle of res judicata with the interests of justice. This discretion must be exercised on a case by case basis and such relief should be granted only in truly exceptional cases, otherwise the purpose of res judicata would be defeated. . . . Second, it gives the court the authority to reserve in the judgment the right of the plaintiff to bring a subsequent action. . . . **It could also be useful in cases where the plaintiff may be unsure whether he will suffer future** injuries from the event which he is presently litigating, e.g., risk of contracting cancer from exposure to asbestos. [Citations omitted.] But it is not intended to apply in the case where the plaintiff has simply failed to assert a right or claim for damages through oversight or lack of proper preparation. [Emphasis added.]

The present case provides exceptional circumstances. In balancing the principle of res judicata with the interests of justice, we conclude that the trial court did not abuse its discretion in granting relief from the judgment by reserving plaintiffs' rights under exceptional circumstances. This case involving exposure to nicotine is analogous to a case involving exposure to asbestos. A reservation of rights can be useful in cases where the plaintiffs are not sure if they will suffer future injuries from the event they are presently litigating, i.e., the risk of contracting serious diseases from exposure to nicotine which is comparable to the example stated in the 1990 Comment, i.e., the risk of contracting serious diseases from exposure to asbestos.

This is an exceptional case because in the interest of justice, a class action is the most effective way to efficiently and economically handle this claim for medical monitoring. Because of the potentially large number of *de minimis* claims, a class would allow access to the courts for claimants who ordinarily might not be able to litigate. Without a class action, the claimants could not bring an action for medical monitoring, which is designed to assist them in the cessation of smoking, and is designed to monitor the medical condition of class members to ascertain whether they may be suffering from diseases caused by, contributed to, or exacerbated by the habit of cigarette smoking. The medical monitoring is necessary to facilitate early detection and possibly successful treatment of a disease caused by nicotine addiction. In certifying a class action claim for medical monitoring, in the present case the trial court did not abuse its discretion in reserving the rights of the plaintiffs and members of this defined class to assert any claims for damages they may have sustained as a result of smoking cigarettes.

CONCLUSION

In accordance with Bourgeois, a claim for medical monitoring is not a novel theory and is a valid cause of action under Louisiana law. A mass tort arising from a common cause is appropriate for class certification where the common cause in this case can be traced to a single source, nicotine and its addictive quality. Class certification is proper because Louisiana law applies where plaintiffs are limited to Louisiana residents. Certification of the class is not based on novel, untested theories or

immature torts because the tort theory of law is based on a products liability action which includes a claim that the product's defect was hidden by the defendants. Plaintiffs assert that the defendants' liability is caused by the singular act of the tobacco industry in selling a defective product after concealing the addictive nature of nicotine.

The claims of the persons specified as class representatives adequately represent a cross-section of the claims made. A class action is the most effective way to efficiently and economically handle this claim for medical monitoring. Although there obviously are individual questions of quantum, this does not preclude a class action where the predominant liability issues are common to the class.

The trial court properly limited the class to smokers, Louisiana residents who are or who were smokers on or before May 24, 1996, of cigarettes manufactured by the defendants, provided the class member alleges that he or she commenced smoking before September 1, 1988 or that one or more defendants actively or intentionally engaged in a course of conduct designed to undermine or eliminate compliance with or attention to warnings on cigarette packaging. The class is limited to smokers who desire to participate in a program designed to assist them in the cessation of smoking and/or to monitor the medical condition of class members to ascertain whether they may be suffering from diseases caused by, contributed to, or exacerbated by the habit of cigarette smoking. The trial court properly reserved the right of plaintiffs and members of this defined class to assert any claims for damages they may have sustained as a result of smoking

cigarettes. The class action is limited only to a claim for a medical monitoring program.

Accordingly, we affirm the trial court's judgment certifying and defining the class.

AFFIRMED.

APPENDIX O

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

The relevant provisions of the Louisiana Code of Civil Procedure, La. C.C.P. arts. 591, 592, and 593.1 (1996), are as follows:

Art. 591. Prerequisites

A class action may be instituted when the persons constituting the class are so numerous as to make it impracticable for all of them to join or be joined as parties, and the character of the right sought to be enforced for or against the members of the class is: (1) Common to all members of the class; or (2) Secondary, in the sense that the owner of a primary right refuses to enforce it, and a member of the class thereby becomes entitled to enforce the right.

Art. 592. Representation

One or more members of a class, who will fairly insure the adequate representation of all members, may sue or be sued in a class action on behalf of all members.

Art. 593.1. Procedure

A. After commencement of an action by or on behalf of parties alleged to be members of a class, the court, on its own motion, or on the motion of any party or on trial of any exception directed to such issue, shall determine whether the action may be properly maintained as a class action as a prerequisite to any further proceedings therein. If the court finds that the action should be maintained as a class action, it shall certify the action accordingly; otherwise the action shall be dismissed. The court may permit amendment of the pleadings in the action to permit maintenance thereof as an ordinary proceeding on behalf of parties expressly named therein.

B. In the process of class certification or at any time thereafter before decision on the merits, the court may alter, amend or recall its certification and may enlarge, restrict, or otherwise redefine the constituency of the class or the issues to be maintained in the class action.

C. After determining that the pending action is appropriate for litigation as a class action, the court may, on its own motion or on the motion or recommendation of any party, adopt a plan for the management of the class action litigation, which may include provisions for subdivision of the action or separation of the issues therein raised, to which these rules of procedure shall be applicable as though each were a separate action. The management plan may provide for separate trials of separate issues and, if jury trial has been requested and is otherwise permissible, each separate trial may

be heard before the same or another jury as the court may direct in the interest of justice. The management plan may provide for separate trials of the following issues in the order herein set forth:

(1) Liability for all damages.

(2) Determination of any item of damage common to the class and the basis for assessment thereof.

(3) Assessment of common damages on the basis determined in (2) above or on such basis as may be appropriate in the absence of any prior determination of the basis thereof.

(4) Determination and assessment of individual damages not common to the class, either in one trial or in a series of trials involving one or more members of the class.

D. The court may sign a judgment after trial of any separate issue or it may, in the interest of justice, withhold the signing of a judgment on any issue until all issues have been adjudicated. In no event shall the court sign any judgment awarding damages unless and until a judgment has been previously signed adjudicating all liability issues.

No. 10-735

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., *ET AL.*,

Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND ALL OTHER PERSONS
SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

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QUESTIONS PRESENTED

1. Have Petitioners requested an inappropriate advisory opinion when the judgment below is supported by alternate proven causes of action in which their defenses are immaterial?

2. Does the Due Process Clause prohibit States from recognizing classwide causes of action, such as for increased risk of harm, that result in classwide injunctive remedies without requiring individualized proof?

3. Must a state court permit unfettered cross-examination of named class representatives to present evidence that is merely cumulative and largely immaterial?

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Callmann, Rudolf, *The Law of Unfair Competition, Trademarks and Monopolies* (Louis Altman ed., 4th ed. 1994) 27

Cohen, Bob, *Right to Private Action Under State Consumer Protection Act-Preconditions to Action*, 117 A.L.R. 5th 155 (2004) 25

Cole, Steven J., *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 Antitrust L.J. 125 (1987) 26

McCormick, C., *Law of Damages* (1935) 19

Memorandum from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co. (Apr. 29, 1988) 17

Moore, James Wm., *et al.*, *Moore's Federal Practice* (3d ed. 1999) 22

Newberg, Herbert R. & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) 20

Restatement (Second) of Torts (1965) 14

Schwartz, Victor E., *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1 (2005) 26

Sovern, Jeff, *Private Actions under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437 (1991) 26

Townsley, William E. & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 Cal. W. L. Rev. 275 (1989) 17

Rules

Fed. R. Civ. P. 23 1

S. Ct. R. 15 6

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Deania M. Jackson, on behalf of herself and all other persons similarly situated, respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the Louisiana Fourth Circuit Court of Appeal.

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs, Deania M. Jackson and the late Gloria Scott, commenced this statewide class action in Louisiana on May 24, 1996 against the major cigarette companies and their trade association, the Tobacco Institute.[1] Class certification was denied for their original claim for compensatory damages arising from nicotine dependence. In 1997, the trial court certified an alternate, more limited class of Louisiana smokers, who, as of May 24, 1996, desired to participate in a smoking-cessation program or medical monitoring program, and who alleged that one or more defendants intentionally acted to undermine or eliminate compliance with or attention to cigarette packaging warnings. Pet. App. 283a-

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[1] The two named plaintiffs were originally part of a broader nationwide class action seeking compensatory and punitive damages that the U.S. Court of Appeals for the Fifth Circuit decertified largely because of how "variations in state law affect predominance and superiority" in conducting a class action. *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). *Castano's* reading of Rule 23, not relevant here, is not without controversy. *See, e.g., Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007).

284a.[2] The Court of Appeal affirmed the certification, and the Louisiana Supreme Court denied writs. *See* Pet. App. 62a, 281a-303a.

The case was tried in two phases over nine months between June 18, 2001 and May 21, 2004. The trial plan, after numerous writ applications and remands that altered the plan, was validated by Louisiana's appellate courts. *See* Pet. App. 34a, 260a-280a.

The Phase I trial on common issues of fault and causation took six months, during which 44 fact and expert witnesses testified and thousands of documents were admitted into evidence. Pet. App. 106a, 106a n.6. On a claim made pursuant to La. Civ. Code art. 2315(A), App. 1a, the jury found that defendants deliberately concealed the addictive qualities of the nicotine used in their cigarettes, which they knowingly designed and employed to addict smokers so that quitting became extremely difficult, if not impossible. Pet. App. 228a-234a (Jury Special Verdict 6-17). It further found, in accordance with Louisiana law, that the nicotine dependence caused by Defendants' misconduct constituted cognizable injury because it led to a significantly increased risk of contracting a latent disease. Pet. App. 234a (Jury Special Verdict 17). On the claim of fraud, the jury separately found that Defendants engaged in a massive half-century campaign to undermine health warnings and other information

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[2] The Louisiana courts have ruled throughout these proceedings that "individualized claims of class members for damages have been reserved, and will have to be litigated in the future," if at all. Pet. App. 65a.

about smoking and disease, which increased the risk of harm to the entire class. As part of this claim, the jury found Defendants had engaged in fraud by intentionally distorting the body of public knowledge about smoking and health, upon which an intended and foreseeable class of Louisiana citizens relied to their detriment. Pet. App. 235a-240a (Jury Special Verdict 19-30).

The jury also found the elements of conspiracy proven. Pet. App. 240a-243a. In addition, Defendants were held to have assumed and intentionally breached a duty not to market cigarettes to minors.[3] Pet. App. 244a-248a. The jury rejected Plaintiffs' product liability cause of action. Pet. App. 248a-52a. The jury then determined that each of the proven causes of action independently justified the remedy of smoking-cessation assistance. Pet. App. 193a-194a, 196a, 240a-243a, 252a-258a.

The trial court held Plaintiffs satisfied Louisiana's requirements for a class action seeking medical monitoring, but the jury declined to approve that remedy. It did, however, find that smoking-cessation assistance was warranted on this record. Pet. App. 193a-194a, 196a, 240a-243a, 252a-258a. The jury rejected Defendants' defense that smokers knew about the hazards and addicting qualities of cigarettes. Pet. App. 258a.

The trial court further held that, because the action sought a single, common, unitary, court-supervised fund by the class as a whole, "the only question of reliance is reliance of the class as a whole

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[3] Both named plaintiffs began smoking as minors.

and the Phase I jury found class wide reliance." Pet. App. 222a; *see also* Pet. App. 213a. The court then held that individual reliance was not a Phase II issue, which focused on the nature and scope of the cessation program, but held individual reliance was instead "reserved for Phase IV individual, monetary damage trials." Pet. App. 222a. The Louisiana Court of Appeal later agreed, and the Supreme Court denied further review. Pet. App. 46a, *writ denied*, 973 So.2d 740 (La. 2008).

The trial court noted that Defendants provided the court with "no controlling authority for the proposition that they have a 'due process' right to conduct an individualized jury trial for each class member" where Plaintiffs limited their claim to participating in a court-supervised remedial program. Pet. App. 199a. Defendants, it further noted, "have had the full and fair due process right to present evidence during the Phase I trial, which included all issues of liability and causation." Pet. App. 199a-200a.

The Phase II trial was designed to establish "the threshold requirements for the establishment" of smoking-cessation programs, eligibility for that assistance, and the scope and content of the programs. Pet. App. 198a. Phase II resulted in an order to establish a court-supervised smoking-cessation program and requiring Defendants to deposit $591,343,476.55 into the Registry of Court. Pet. App. 105a. Plaintiffs proposed a twelve-component program supported by uncontested expert evidence. Pet. App. 119a. Defendants conceded that five of the components were effective and endorsed by experts. Pet. App. 120a. The jury found all twelve

components appropriate. Although Plaintiffs asked for a 25-year program, the jury limited it to a ten-year program. *See, e.g.*, Pet. App. 173a.

Plaintiffs presented evidence that the class consisted of 505,000, while Defendants placed the number at 440,000. Pet. App. 122a. The jury accepted the 505,000 figure. The jury also accepted Plaintiffs' evidence that there would be 202,000 attempts to quit each year; Defendants' evidence "was essentially very similar." Pet. App. 126a, 129a. The jury determined that $591,342,476.55 was needed to fund the program for ten years, including administration. Pet. App. 131a. The cost of the program was not seriously challenged by Defendants. Pet. App. 128a.

On further appeal, the Louisiana Court of Appeal concluded that Plaintiffs' claims were not novel legal theories and contained clear common issues of fact, making it susceptible to class treatment. Pet. App. 289a. Trying the case as a class, the court held, was the only economically feasible way to pursue the limited remedy sought. Pet. App. 290a, 302a. This was especially so after the court later held that the average yearly cost of smoking-cessation assistance per plaintiff is only $153, rendering the case uneconomic to try any other way. Pet. App. 27a. Still, the appeals court found the class improperly included Plaintiffs whose claims, if any, accrued after enactment of the 1988 Louisiana Products Liability Act (LPLA), La. Rev. Stat. §§ 9:2800.51 *et seq.*, and found the eligible class members numbered at least 250,000. Pet. App. 26a. Accepting a 40 percent utilization rate consistent with the jury's findings and accounting for death and

success at quitting, Pet. App. 27a & n.19, as well as a reduced program of four smoking-cessation components, the total cost for services was set at $230,038,560 to be paid into the court's registry in trust. Pet. App. 28a. The Court also sustained a five-percent third-party administration fee. Pet. App. 28a. The fund, the court held, "is in the nature of a trust fund, its oversight is a fiduciary obligation of the court." Pet. 28a. Thus, the court ordered that it be kept in an interest-bearing account in a federally insured depository institution, with Defendants retaining the right to assert claims to unspent or surplus funds. Pet. 28a-29a.

The appellate court also specifically held that the Defendants had the right to assert their "claims to any unspent or surplus funds" from the program. Pet. App. 29a.

The Louisiana Supreme Court denied further review and Defendants' request for a stay. Justice Scalia, acting as Circuit Justice, granted a stay on September 24, 2010.

B. Misstatements of Facts and Law in the Petition

Pursuant to S. Ct. R. 15, Plaintiffs are obliged to address misstatements of fact and law in the Petition. In the introduction to the Question Presented, Defendants overstate the size of the class at issue when they say the "Louisiana courts certified a class of over 500,000 Louisiana smokers." Pet. i. After appellate review, the eligible class members were reduced to 250,000. Pet. 26a. In the same introductory statement, Defendants peg the award to the class at $270 million. Pet. i. The remedy

ordered here, however, was the funding of a court-administered smoking-cessation program at a cost of $230,038,560, plus a five-percent third-party administrative fee of $11,501,928 to run the program. Pet. App. 28a. No damages were awarded to any plaintiff.

Defendants also assert that Plaintiffs advanced only three legal claims—product defect, fraud, and breach of an assumed duty. Pet. 4. Plaintiffs actually asserted five claims. For example, Plaintiffs pursued their cause of action for nicotine manipulation and addiction pursuant to La. Civ. Code art. 2315(A), App. 1a, a statute that establishes liability for acts causing damages and one that the Petition never mentions. *See* Pet. App. 73a (acknowledging that the cause of action arises under art. 2315). In addition, Plaintiffs made out a cause of action for conspiracy. *See* Pet. App. 240a-243a. Several of these causes of action, as explained *infra*, have no requirement that reliance be proven.

It is critical to understand, contrary to the false impression left by the Petition, that no money has been paid and "[n]ot a single habitual smoker has yet benefitted from the [smoking-cessation] program [ordered in this case]." Pet. App. 19a. Moreover, the "recipient of the award is not an individual or even a group of individuals; it is a court-established and court-supervised smoking cessation pro-gram with a limited ten-year life." Pet. App. 20a.

Defendants also characterize the record as containing "no evidence that the class representatives or *any* identifiable class member detrimentally relied on any alleged misstatement or

omission or had otherwise been injured by defendants' conduct." Pet. 5. Defendants add that the experts Plaintiffs called to testify "did not (and could not) connect their assertions [about smoking's health impact and disinformation campaign] to the class representatives or any other identifiable members." Pet. 5-6. This is false. Plaintiffs' experts were extensively cross-examined about the class representatives, their knowledge of smoking's health hazards, and their ability to quit on their own. For example, Defendants asked Plaintiffs' expert Dr. Cummings whether advertising was a factor in starting either Mrs. Jackson or Mrs. Scott smoking. He replied, "I think it did." Tr. 13590.[4]

Although the Petition is largely premised on an assertion that Defendants were prevented from presenting evidence on this subject, Defendants repeatedly asked Plaintiffs' experts about the knowledge of named Plaintiffs Scott and Jackson, eliciting precisely the evidence they now say should have been put before the jury—*and was*. As the trial court observed, "Defendants did present the jury with specific facts regarding Ms. Scott, Ms. Jackson, and their smoking histories, as well as their class-wide affirmative defenses." Pet. App. 152a (footnotes

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[4] Defendants also assert that both plaintiffs "knew of their addiction years before they filed suit, which time-barred their claims." Pet. 6. The courts below held otherwise, finding that the causes of action were continuing torts under Louisiana law and not barred. *See* Pet. App. 163a-164a, 165a-166a. *See also* Pet. App. 144a, 146a (discussing evidence that Defendants' intentional misconduct sought to induce continued smoking).

omitted).[5] *See also* Tr. 11984-11985 (Burns); Tr. 13584, 13589-13590 (Cummings); Tr. 15780-15783 (Arnett).

Defendants also assert that the Court of Appeal "speculated (with no record support)" on the number of class members left after reducing the class size to account for claims accruing after passage of the LPLA. Pet. 12. However, the court relied on expert evidence in the record that established the age ranges of members of the class and, on that basis, the court was able to conclude that passage of the LPLA eliminated about half of the class from eligibility, leaving approximately 250,000 of the original 505,000 figure eligible. Pet. App. 26a.

Defendants also erroneously claim that the Louisiana courts used a "nonsensical" 100 percent utilization rate to arrive at the $240 million" fund. Pet. 12. Yet, the Court of Appeal reduced the trial court's class from 505,000 to an eligible number of class members who number at least 250,000, and then employed the proven utilization rate to project an initial year utilization by 210,000 members, diminishing yearly so that in the tenth year of the program the class members seeking cessation services would be reduced to 101,010. Pet. App. 27a & n.19. Using a median annual cost per eligible class member of $153 per year, that Court reduced the funding required from an original assessment of $591 million to $230 million, plus a five percent

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[5] The trial court also noted that the "question of whether Ms. Scott or Ms. Jackson, individually, will participate in the court-supervised" program "is reserved for another day." Pet. App. 152a. Ms. Scott, now deceased, obviously will not.

third-party administrative fee of $11.5 million. Pet. App. 28a. Moreover, the funds will be held in trust, subject to a claim of reimbursement by Defendants for unused sums.

REASONS FOR DENYING THE PETITION

Unlike the impression left by the Petition, this case does not involve highly individualized, fact-intensive claims for monetary relief that are properly subject to individualized defenses. Instead, it involves Louisiana causes of action for a type of relief requiring no individualized proof once certified. Instead, Defendants and their *amici* have poured their generic complaints about state class actions generally into a vessel that cannot hold them.

The gist of Defendants' Due Process complaint is that the Louisiana courts "relieved plaintiffs of their burden to prove the requisite elements of their individual fraud-based claims." Pet. 7. No plaintiff could ever afford to bring an action like this one against defendants for smoking-cessation services valued at $153 per year and available for up to ten years as an individual claim. That Louisiana makes such a cause of action available as a class action without requiring proof of individualized reliance on misrepresentations does not implicate the Due Process Clause.

Even if Defendants are correct that individualized reliance is necessary for an action based on allegations of fraud, which Plaintiffs dispute, such a ruling would not change the judgment below because one or more of Plaintiffs' causes of action are not based on fraud and have no individualized reliance element, rendering the

Petition nothing more than a request for an advisory opinion.

I. THE PETITION IMPROPERLY ASKS THIS COURT FOR AN ADVISORY OPINION

This Court has repeatedly instructed litigants that it will not issue advisory opinions. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). Here, Plaintiffs succeeded at trial on multiple theories of law, any one of which is sufficient to support the remedy ordered. Several of those causes of action do not even theoretically implicate the defenses that the Defendants allege they were prevented from presenting. Thus, even if this Court were to resolve their Question Presented favorably to Defendants, the judgment rendered in this case would remain unchanged and this Court's opinion would be merely advisory.

A. The Cause of Action Based on Nicotine Manipulation Does Not Require Reliance

Separate from Plaintiffs' fraud claim, Defendants were found liable for intentionally designing and manufacturing their cigarettes to promote and sustain addiction through the manipulation of nicotine content, *see* Pet. App. 193a, 212a, 228a, 233a-234a (Jury Findings 7, 15-17), pursuant to La. Civ. Code art. 2315(A), which provides in full that "[e]very act whatever of man

that causes damage to another obliges him by whose fault it happened to repair it."

This cause of action for increasing the risk of harm through nicotine manipulation does not require any proof of reliance. Elements for such a claim are "fault, causation and damage." *Straley v. Calongne Drayage & Storage, Inc.*, 346 So.2d 171, 175 (La. 1977) (citations omitted). For example, in *Bourgeois v. A.P. Green Industries, Inc.*, 716 So.2d 355 (La. 1998), the Louisiana Supreme Court held that an injunctive remedy, such as medical monitoring, was available to Plaintiffs suffering a significantly increased risk of contracting a serious latent disease where they can prove by competent expert testimony that they have suffered significant exposure to a hazardous substance. *See Bonnette v. Conoco, Inc.*, 837 So.2d 1219, 1231 (La. 2003) (characterizing *Bourgeois*).

Liability is thus premised on "'failure to exercise reasonable care in the adoption of a safe plan or design'" because "'*the design must measure up to what the community is entitled to expect* of those who persuade the public to buy their products-sometimes . . . by dint of tremendous advertising campaigns.'" *Gauthier v. Sperry Rand, Inc.*, 252 So.2d 129, 132 (La. Ct. App. 1971) (emphasis added) (quoting with approval, *Dean v. General Motors Corp.*, 301 F. Supp. 187, 190-91 (E.D. La. 1969)).

Here, the jury found that Defendants intentionally designed their cigarettes to engender addiction, hid that information, and "exposed the class of Louisiana smokers to significant levels of substances proven hazardous to human health sufficient to significantly increase the risk of

contracting a serious latent disease related to cigarettes." Pet. App. 234a (Verdict 17). *See also* Pet. App. 193a, 212a, 228a, 233a-234a. That and related findings completely satisfy the elements for this type of liability under Article 2315, involve common issues that can be tried on a class-wide basis, require no element of reliance, and are perfectly addressed by the remedy ordered.

Every testifying expert, Plaintiff or Defendant, agreed that nicotine was addicting, smokers suffer a significantly increased risk of harm, and cessation treatment should be available to all smokers who seek such assistance. Pet. App. 45a, 137a.

This claim required no proof of reliance, especially because the remedy specifically addressed the injury of increased risk of harm. Nor does it matter that the named plaintiffs had stopped smoking during the lengthy time between certification and trial, as the injury of addiction was still relevant to them, both because they undertook this lawsuit for help in quitting smoking, expended personal resources to achieve that end when the litigation dragged on, and still faced the danger of a relapse. Pet. App. 121a (evidence established that numerous barriers exist to quitting, that it takes six to ten attempts to succeed, and the risk of relapse persists for several years); 151a ("testimony in Phase I and Phase II established that Ms. Scott and Ms. Jackson remain susceptible to relapse") (footnote omitted). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 169 (2000) (Breyer, J., dissenting) ("less than 3% of smokers succeed in quitting each year, although 70% want to quit"). In short, Defendants' purported additional defenses are

immaterial to liability imposed on the nicotine-manipulation count.

B. Breach of an Assumed Duty Does Not Require Proof of Reliance

Plaintiffs also proved Defendants breached an assumed duty not to market to children. Pet. App. 246a-248a. Liability for an assumed duty attaches either when a defendant's failure to exercise reasonable care increases risk of harm, *or* fails to perform the duty owed, *or* creates the harm because of reliance on the undertaking. *Bujol v. Entergy Serv., Inc.*, 922 So.2d 1113, 1129 (La. 2004). Reliance is merely an alternate condition precedent to liability and need not be present if one of the other conditions are present.

Defendants disingenuously cite *Dornak v. Lafayette General Hospital*, 399 So.2d 168, 170 (La. 1981), for the proposition that a claim for breach of an assumed duty "requires proof of causation and, in cases such as this, 'reliance on' the defendant's undertaking."[6] Pet. 4. *Dornak*, a case involving failure to disclose a medical condition revealed during a pre-employment examination, merely states that the plaintiff "was entitled to and did rely upon the expectation that she would be told of any dangerous condition actually disclosed by that examination." 399 So.2d at 170. The decision did not require proof of reliance, as Defendants contend, but merely means that plaintiffs properly should expect full disclosure from those undertaking an assumed duty. Here, as in *Dornak*, Defendants withheld

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[6] Defendants also cite *Restatement (Second) of Torts* § 323 (1965) for that proposition, Pet. 4, but the *Restatement* is not a reflection of Louisiana law.

information that should have been revealed to consumers, especially minors, thus constituting a basis for liability. *See* Pet. App. 244a-245a; 144a (summarizing record revealing five decades of "suppression, concealment and omission"). Reliance is not something that needs to be proven in the face of silence when there is nothing to rely upon.

C. Louisiana Law Authorizes Relief Without Proof of Reliance

It is worth noting that Louisiana law recognizes that a claim for medical monitoring can be brought as a class action and requires no proof of reliance, where the need for medical help constitutes the injury. In *Bourgeois*, 716 So.2d at 360-61, the Louisiana Supreme Court set out the requirements for such an action to be: (1) significant exposure to a proven hazardous substance; (2) increased risk of a serious latent disease from that exposure; and, (3) the existence of a medical monitoring procedure that is different from what might be recommended absent the exposure, which is also reliable, prescribed by a qualified physician, and capable of early detection of the disease.

These *Bourgeois* factors are also applicable to the remedy of a court-administered smoking-cessation program and were followed by the courts below. Pet. App. 58a-62a; 147a. The jury found that no reliable, physician-prescribed medical monitoring procedure was available and declined to find that relief appropriate here. Pet. App. 255a-257a. They did, however, conclude that smoking-cessation assistance was warranted. Pet. App. 257a-258a.

In sum, the judgment here is fully supported on alternative grounds from that which is the subject of Defendants' Petition. This case does not provide a proper vehicle for this Court's review of the issue raised by Defendants, and the Petition should be denied.

II. THIS CASE IS NOT A SUITABLE VEHICLE TO CONSIDER DUE PROCESS LIMITATIONS ON STATE CLASS ACTIONS

A. Generic Complaints about State Class Actions Raise No Cert-worthy Issue in this Case

Defendants and their *amici* attempt to fit the round peg of their generic complaints about how states conduct class actions into the square hole of this litigation. It does not fit. Whether the object of their ire is the limited reach of the Class Action Fairness Act, 28 U.S.C. § 1332, Pet. 31, a complaint improperly addressed to this Court, or the potential for "bet-the-company" liability because of a class-action judgment, Pet. 32, a grievance that rings particularly hollow for an industry that is built on the most successful and longest running fraud in American corporate history, one that has been adjudicated a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1 (D.D.C. 2006), *aff'd in part, rev'd in part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3501 (2010), and has been before this Court a number of times. *See, e.g., Altria Group, Inc. v. Good*, 555 U.S. 70 (2008); *Philip Morris USA v. Williams*,

549 U.S. 346 (2007); *Watson v. Philip Morris Co., Inc.*, 551 U.S. 142 (2007).

Contrary to its portrayal by Defendants, the Louisiana courts handled this case with an unusually high solicitude for the due-process rights of Defendants and represents careful adherence to preexisting state law and procedure. During 14 years of litigation, the Louisiana courts indulged a wide and time-consuming range of Defendants' objections, requests, arguments, and trial tactics,[7] while providing an unheard-of number of discretionary reviews and according Defendants substantial relief throughout that process. Before trial, more than 200 motions were decided, as were a significant number during the trial. Pet. App. 191a. Defendants sought and received months of *voir dire*. Thousands of pages of deposition testimony were contested and ruled upon, as were additional thousands of pages of documentary evidence. Pet. App. 191a. Forty-four fact and expert witnesses testified and were cross-examined, and the Phase I trial record ran more than 30,000 pages and took six months. Pet. App. 191a-192a. Defendants filed more than 50 writs and appeals[8] and received multiple court-ordered

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[7] The tobacco companies' penchant for trial delay and litigation by attrition to outlast its opponents is well documented. *See, e.g., Haines v. Liggett Group, Inc.*, 814 F.Supp. 414, 421 (D.N.J. 1993) (citing Memorandum from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co. (Apr. 29, 1988)); William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 Cal. W. L. Rev. 275, 276-77 (1989).

[8] Prior to this petition, Defendants had filed 31 writ applications and four appeals to the Louisiana Court of Appeal, 22 writ applications to the Louisiana Supreme Court, and one

reductions in the size of the eligible class (from 505,000 to 250,000) and in the monetary assessment made by the jury (from $591 million to $230 million). The due process observed in this litigation was at its zenith.

In support of certiorari, Defendants complain that state courts "lack the uniform protections of Rule 23 and the Rules Enabling Act," Pet. 31, so they seek to interpose some of those requirements as a function of the Due Process Clause, as if the constitutional guarantee were an empty vessel to be filled with a litigant's most fervent desires. It plainly is not. *See BMW of No. Am., Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting) (the clause is not "a secret repository of substantive guarantees against 'unfairness.'"). Moreover, "fidelity to the Rules Enabling Act," *Amchem Products., Inc. v. Windsor*, 521 U.S. 591, 629 (1997), is not a requirement of state class actions, which must be measured instead by fidelity to state law.

In fact, this Court has long recognized that the Due Process Clause does not "compel the [States'] adoption of the particular rules thought by this court to be appropriate for the federal courts." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Instead, states are "generally free to develop their own rules for protecting against . . . the piecemeal resolution of disputes," and are only overridden when they adopt "extreme applications" "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996).

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prior petition for certiorari and one stay application to this Court.

Louisiana's courts do not adopt rules of procedure in the manner that common-law courts do. Its procedures are dictated by statute, and compliance with those statutes here was complete. No extreme application occurred, and no fundamental right abridged.

B. This Case Presents No Issue of Great National Importance or Conflict between Courts Concerning Representativeness in Class Actions

The large overarching theme that underlies Defendants' Petition is a claim that the "departure from representative litigation was so extreme" because both class representatives had already quit smoking years before trial. Pet. 12-13; *see also* Pet. 6, 26. Putting aside the lack of legal merit in the allegation for just a moment, the assertion is so bizarre on its face that it can be rejected out of hand.

It asserts that, in order to maintain this class action begun in 1996 and certified in 1997, Ms. Scott and Ms. Jackson were obligated to keep smoking throughout the course of this case, or at least during the period between 2001 and 2004 when it was tried. While Ms. Jackson and the late Ms. Scott quit smoking in 2000 and 2001, respectively, while fearing a relapse, *see* Pet. App. 151a, they certainly had no obligation to continue to jeopardize their health to maintain this action, while quitting satisfied an obligation to mitigate damages. *See Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 232 n.15 (1982) (citing with approval, C. McCormick, *Law of Damages* 127 (1935), for "the general rule" that the

plaintiff must "use such means as are reasonable . . . to avoid or minimize the damages.").

Defendants seek more and state that the "constitutional question raised by these proceedings" amounts to: "Does a class action permit the aggregation of individual claims only where the named plaintiffs are truly representative of absent class members?" Pet. 13. *See also* Pet. 14 ("The Louisiana courts ignored the core due process safeguard—representativeness—that legitimizes class-action litigation"). That question is not an unanswered issue of great national importance, does not constitute a question that various courts have answered differently, and is not presented by the proceedings in this case.

It is axiomatic that a class representative must be a member of the class at the time the class is certified. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). When it is only later that plaintiffs are no longer class members or are otherwise inappropriate representatives, class claims are neither mooted nor destroyed. *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977). Thus, "once a case is certified as a class action, the named plaintiff may lose that status which had qualified him to bring the suit and still be acceptable as a party to prosecute the suit to conclusion on behalf of the class." *Sosna*, 419 U.S. at 412 (White, J., dissenting) (characterizing majority holding). *See also* Herbert R. Newberg & Alba Conte, *Newberg on Class Actions* § 2.28 (3d ed. 1992) (courts have generally permitted a class representative to continue acting in a representative capacity on behalf of his or her class, as "the claims of absent

members remain viable independently from those of the class representative").

At that point, the key question becomes adequacy of representation, *id.* at 403, which "serves to uncover conflicts of interest between the named parties and the class they seek to represent." *Amchem Prods.*, 521 U.S at 625. The adequacy requirement "tend[s] to merge" with the commonality and typicality, which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiffs claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tele. Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982).

Unquestionably, "it is enough that they 'share common objectives and legal or factual positions.'" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999). Here, the named plaintiffs fully qualified as class representatives at the time of certification.[9] The Louisiana courts repeatedly reviewed the adequacy, commonality, and typicality of named plaintiffs' claims and representation, and were

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[9] Defendants attacked their status, *inter alia*, because they allegedly were not deceived by Defendants into beginning their smoking habit. That attack was rebuffed by the courts because Ms. Scott and Ms. Jackson established they were smokers and in need of smoking-cessation assistance, which were the essential allegations made on behalf of the class. Pet. App. 150a. Moreover, as the record showed, even the allegations of fraud were focused on how Defendants' misrepresentations and omissions were aimed at encouraging existing smokers to keep smoking.

satisfied that no conflict existed and representation was vigorous. *See* Pet. 150a n.134 (listing judicial review of adequacy in 1998, 1999, 2000, 2001, and 2002).

Defendants rely upon *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), Pet. 18, to assert that the representatives' defects caused a denial of Defendants' opportunity to assert every defense. Defendants overstate *Broussard's* holding, which was premised on conflicts of interest within the class and statute of limitations defenses based on oral misrepresentations from individual franchisor representatives and not continuous company-wide efforts, defects not present here. Still, most courts have rejected *Broussard's* treatment of a limitations defense as a *per se* disqualifier for class certification. *See In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162 (3d Cir. 2002) (rejecting *Broussard* and declaring "most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings"); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)" (citing 5 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 23.46[3], at 23-210 to -211 (3d ed. 1999))). If the conflict between *Broussard* and other federal circuits is worthy of this Court's attention, it is worthy only to resolve differences between federal courts over federal rules and not state implementation of their own class-action requirements.

C. Limiting Cross-Examination of Named Plaintiffs Here Does Not Merit this Court's Attention

Defendants' assertion that they were not permitted to raise every possible defense comes down to the fact that their cross-examination of the named plaintiffs was limited. Defendants asserted below that they needed that cross examination to show that the two class representatives smoked for reasons unrelated to any alleged misconduct; that they had received warnings about the risks of smoking from doctors, family, and the media; that they were fully aware of the federally-mandated health warnings; and, that they were aware of their alleged injury many years prior to the filing of this lawsuit. Pet. App. 48a.

The court below called the denial of cross-examination, at most, "harmless error," because the jury ruled in Defendants' favor on Plaintiffs' products liability theory relating to why members of the class began smoking, but against Defendants on the causes of action relating to the cause of Plaintiffs' continued smoking. Pet. App. 48a-49a. It further found the other information Defendants sought to elicit from the named representatives "irrelevant" because it was proven that "defendants consciously withheld information vitally important to an informed decision to smoke or not." Pet. App. 49a.

Further cross-examination going to whether the statute of limitations had expired was also ruled irrelevant by the Court of Appeal because Louisiana recognized Defendants' conduct as a continuing tort during the relevant time period. Pet. App. 52a-54a. Under Louisiana precedent, that court held, "the

continuous tort doctrine does not encompass the plaintiff's knowledge in order to decide when prescription will begin to run." Pet. App. 53a (citation omitted).

Perhaps, equally important, the information Defendants sought through cross was merely cumulative. *See Mitchell v. Limoges*, 923 So.2d 906, 908 (La. Ct. App. 2006) (no error in excluding cumulative testimony entered into the record by other means). As demonstrated *supra* 8-9, and conceded by Defendants' own extensive transcript citations, *see* Pet. 6, this information of questionable relevancy made it into evidence and was considered by the Louisiana courts in Defendants' repeated attacks on the named plaintiffs' representativeness. Pet. App. 150a n.134. The Louisiana Constitution authorizes the Court of Appeal to consider facts *de novo*, La. Const. art. V, § 10(B), and it did.

For good reason in applying due process, this Court has "declined to establish rigid rules and instead ha[s] embraced a framework to evaluate the sufficiency of particular procedures." *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005) (internal quotation marks and alteration omitted). The procedures employed by the Louisiana courts in providing multiple reasoned reviews, including the evidence supposedly excluded, satisfies that standard. It is not even a close call. Defendants' complaint really comes down to its disagreement with the reasoning of the Louisiana courts. That complaint provides no warrant for this Court to review this matter.

Based on the length of this litigation, the Court of Appeal observed that "[f]urther delay in rendering judgment will unnecessarily and, more

importantly, unfairly impair the possibilities of aging smokers to cease their habits and to surely improve their own lives, not to mention the lives of their family members and co-workers." Pet. 19a. Society has no interest in restarting litigation because named plaintiffs quit smoking before the remedy was ordered or implemented. The Petition should be denied.

III. INDIVIDUAL RELIANCE IS NOT REQUIRED BY DUE PROCESS FOR ALL FORMS OF CLASS ACTIONS

Defendants claim proof of individualized reliance is "indispensible" as a matter of Due Process to establish fraud and was improperly eliminated in this case in order to make class adjudication possible. Pet. 12. Statutes and precedent demonstrate otherwise and render Defendants' claim erroneous.

A. Many State Statutes Sounding in Fraud Eschew Proof of Reliance

If Defendants' radical claim was correct, nearly every state's consumer protection statute would violate Due Process. These laws do not require reliance in order to state a claim under their respective consumer-fraud or unfair-and-deceptive-trade-practices acts. *See* Bob Cohen, *Right to Private Action Under State Consumer Protection Act-Preconditions to Action*, 117 A.L.R. 5th 155, 222-44 (2004).[10] Of those states that require proof of

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[10] Referred to as "little FTC Acts", these consumer protection laws, now present in every state, Jeff Sovern, *Private Actions under the Deceptive Trade Practices Acts: Reconsidering*

reliance, "most" adopt "a[n] [objective] standard similar to the test under the [Federal Trade Commission] Act: whether the act has the tendency or capacity to mislead consumers, regardless of whether the plaintiff actually and reasonably relied on the misrepresentation." *See* Victor E. Schwartz, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 18 (2005).

Moreover, where proof of reliance is required, it is often not necessary to prove reliance by direct evidence, *e.g.*, consumer testimony or circumstantial evidence such as consumer surveys, consumer reaction tests, or market research. *See, e.g.*, *Group Health Plan, Inc. v. Defendants Inc.*, 621 N.W.2d 2, 14 (Minn. 2001) (where allegations are based on "lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made . . . need not include direct evidence of reliance by individual consumers of defendants' products."); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) ("proof of individual reliance by each purchasing customer is not needed."); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985) (joined by Scalia, J.) (rejecting the "contention that consumer survey evidence must, as a matter of law, be presented to support a finding that an advertisement has a

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the FTC Act as Rule Model, 52 Ohio St. L.J. 437, 446 (1991), were the product of a joint endeavor by the Federal Trade Commission (FTC) and Council on State Governments to encourage States to adopt supplementary consumer protection beyond what the resources available to the FTC could accomplish. Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 Antitrust L.J. 125, 126 (1987).

tendency to deceive and violates section 5 of the FTC Act").

Instead, reliance may be established by expert testimony. 1A Rudolf Callmann, *The Law of Unfair Competition, Trademarks and Monopolies* § 51.6, at 92 (Louis Altman ed., 4th ed. 1994). It also "may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." *Vasquez v. Superior Court*, 484 P.2d 964, 972 (Cal. 1971) (internal quotation marks omitted). Rebuttal evidence is, of course, permitted; a defendant may cross-examine plaintiffs' experts or have its own experts testify that a reasonably prudent person would not have so relied. But where direct evidence of individualized reliance is not required to make a *prima facie* showing of fraud or consumer deception, neither is there a basis to demand that individual consumers nonetheless be cross-examined. *See Figgie Int'l*, 994 F.2d at 608-09.

Under the Lanham Act, liability arises for false or deceptive advertising. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002). When "challenged commercial claims are 'literally false,' a court may grant relief without considering whether the buying public was actually misled." *Id.* (citation omitted). When "consumer deception can be determined by examining the challenged name or advertising on its face, the plaintiff is excused from the burden of demonstrating actual deception." *Id.* at 587. Individual reliance is obviously not required.

That none of these remedial schemes foregoing proof of reliance engender federal due process problems demonstrates that Defendants' Petition does not present a due process question meriting this Court's consideration.

B. Judicial Decisions Do Not Require Individualized Reliance for All Fraud Actions

Courts have not held reliance to be a constitutionally "indispensible" feature of fraud claims. Nor is it "a general limitation on civil recovery in tort.'" *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 655-56 (2008) (citations omitted). In *Bridge*, this Court rejected an argument that claims predicated on mail fraud must prove reliance on the defendant's misrepresentation. Instead, it recognized that "a person can be injured 'by reason of a pattern of mail fraud even if he has not relied on any misrepresentation." *Id.* at 649. Its absence obviously does not violate due process.

Various state courts have reached similar conclusions. The Oregon Supreme Court, for example, has held that whether the state's consumer protection act "requires reliance as an element of causation necessarily depends on the particular unlawful practice alleged." *Sanders v. Francis*, 561 P.2d 1003, 1006 (Or. 1977). Accordingly, for example, under Oregon law, "when the representation takes the form of a failure to disclose . . . it would be artificial to require a pleading that plaintiff had relied on that non-disclosure." *Id.*

Defendants rely heavily on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008),

to assert that a trial plan that determined damages to the class as a whole before assessing individual claims violates Due Process. Pet. 20. Yet, a court within that circuit has held, after this Court's decision in *Bridge*, *McLaughlin* is "no longer good law on the question of whether a plaintiff must show that he or she was personally a recipient of a material misrepresentation." *Spencer v. Hartford Fin. Servs. Group, Inc.*, 256 F.R.D. 284, 297 (D. Conn. 2009). Defendants' other precedent, *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007), was only decertified because issues of consent removed the predominance issue from the class. *Id.* at 206. On the other hand, consent was authoritatively determined to be absent here. Pet. App. 258a.

Plainly, Due Process does not require proof of individualized reliance in the form of direct testimony (subject to cross-examination) by consumers in order for a defendant to be held liable for fraud.

C. Louisiana Law Does Not Require Direct Proof of Individualized Reliance

Defendants do not provide a fair description of what the Court of Appeal held Louisiana law requires in order to prove fraud. The Court of Appeal did not hold, as Defendants maintain, that the requisite showing of reliance depends on whether the fraud claim proceeds on an individualized or class basis. The court instead concluded that the requisite proof of reliance turns on the nature of the fraud and the remedy sought. Where, as here, fraud occurred by concealment, suppression, or omission, and the

remedy sought did not seek individual damages but a remedial program administered by the court, plaintiffs may establish, through expert testimony, reliance on an objective basis and may be proven class-wide. *See* Pet. App. 46a-47a. The same would be true if the case had been brought as an individual action seeking a smoking-cessation remedy. That objective, reasonable-person reliance standard is constitutionally unassailable, as is its application here, and thus the Petition should be denied.

Contrary to Defendants' contention, the Court of Appeal's phrase "class-wide reliance," Pet. App. 47a, while perhaps imprecise, cannot fairly be read to mean that the court eliminated any need to show reliance. The phrase "class-wide reliance" was used to refer to an objective, reasonableness standard. *See* Pet. App. 47a, 46a (noting that the jury found that reliance was reasonable).

It is a standard that is widely utilized. For instance, in *Vasquez*, a class action concerning fraud in the inducement of contracts, the California Supreme Court concluded: "The requirement that reliance must be justified in order to support recovery [for fraud] may also be shown on a class basis." 484 P.2d at 973 n.9. Reliance on a "class basis" means that "[i]f the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise." *Id.* at 973 n.9.

Similarly, in *Dix v. American Bankers Life Assurance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987), which concerned allegations of fraud by purchasers of tax-sheltered annuities, the Michigan

Supreme Court held that reliance called for an objective inquiry and could be established class-wide. It explained:

> members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations.

Id. at 209.

It further must be recalled that Louisiana's action for fraud is statutory. Louisiana Civil Code article 1953 provides that "[f]raud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." Construing that provision, the Louisiana courts have held that "to recover for negligent misrepresentation, there must be a legal duty on the part of the defendant to supply correct information, a breach of that duty, and damage to the plaintiff caused by the breach." *Duplechin v. Adams*, 665 So.2d 80, 84 (La. Ct. App. 1995). To emphasize, venerable holdings of the Louisiana Supreme Court establish that "'[t]wo things are necessary to constitute fraud: the intention to defraud, and actual loss or damage, or such strong probability of it as will induce a court to interfere.'" *Buxton v. McKendrick*, 64 So.2d 844 (La. 1953) (citation omitted). Both were amply satisfied at trial.

Defendants' Petition is premised on a flawed understanding of what proof of reliance is required under Louisiana law to establish fraud. Defendants argue that Louisiana law requires proof of individualized reliance. Pet. 4 (citing *Banks v. New York Life Ins. Co.*, 737 So.2d 1275 (La. 1999)). They then characterize the decision below as "h[olding] that proof of individualized reliance was unnecessary in the context of a class action," Pet. 9-10, by which Defendants mean that the Court of Appeal believed that proof of individualized reliance otherwise would be necessary in the context of an individual action. *See id.*; *see also id.* at 22. That is a gross misreading of the decision below.

Nowhere in its Petition do Defendants mention that the Court of Appeal authoritatively rejected this reading of *Banks*, *see* Pet. App. 46a, and may not be second-guessed on its reading.[11] That court distinguished *Banks* because its fraud involved only affirmative misrepresentations made individually by different agents to different customers. *Id.* It held, however, that in cases concerning "fraud of suppression, concealment, and omission" accomplished through "indirect communications," Pet. App. 46a, such as in the instant case, Louisiana law did not require "direct evidence of reliance by consumers," but; rather, reliance could be established on a class basis. Pet.

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[11] Defendants may disagree with this reading of *Banks*, but the Court of Appeal's understanding of state law, which the Louisiana Supreme Court let stand and which the Louisiana Constitution recognizes as authoritative, La. Const. art. V, § 10(B), is due deference by this Court as the definitive exposition of state law.

App. 47a. If this were an individual case, reliance could be established on an objective basis.

Defendants further contend, Pet. 22, that no Louisiana court had ever permitted reliance to be proved on a class basis, but that is not correct. In *Mire v. Eatel Corp, Inc.*, 849 So.2d 608 (La. Ct. App.), *writ denied*, 855 So.2d 317 (La. 2003), for example, the court explained that, under Louisiana law, "the inquiry under a redhibition claim does not involve the buyer's subjective knowledge or reliance, but rather is an objective inquiry into the deficiency and whether it diminishes the product's value or renders it so inconvenient that the reasonable buyer would not have purchased it had he known of the deficiency." *Id.* at 614. Whether the defendant in that case was liable to the claimants was "obviously common to all [of them]," and thus the Court of Appeal affirmed "the trial court's finding that questions of law or fact common to the members of the entire class predominate over those affecting only individual members."[12] *Id.*

The evidence of the type of reliance required by Louisiana law was overwhelming in this case—a conclusion shared by other fact finders presented with the same expert testimony. *See United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1 (D.D.C. 2006) (finding that tobacco companies' statements regarding health effects of smoking evidenced specific intent to defraud the public), *aff'd in part, rev'd in part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert.*

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[12] The class was later de-certified after plaintiffs failed to state a claim for redhibition. *See* 927 So.2d 1113 (La. Ct. App. 2005).

denied, 130 S.Ct. 3501 (2010); *see also id.* at 204 (crediting a corporate executive's testimony that "[w]hen Philip Morris made statements about smoking and health, the company intended the public—including consumers and public health authorities—to rely on them"); *Williams v. Philip Morris USA, Inc.*, 127 P.3d 1165, 1170 n.1 (Or. 2006) ("As a for-profit corporation, [Philip Morris] would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding), *rev'd on other grounds*, 127 S.Ct. 1057 (2007), *aff'd on remand*, 176 P.3d 1255 (Or. 2008), *pet. for cert. dismissed as improvidently granted*, 129 S.Ct. 1436 (2009).

Plaintiffs proved through expert testimony that a reasonably prudent person who began smoking prior to 1988 would have relied on Defendants' indirect communications, made between December 1953 and May 24, 1996, that smoking is neither addictive nor severely harmful, in continuing to smoke. *See* Pet. App. 47a-48a, 51a-52a. Defendants had a full opportunity to rebut this evidence; in fact, they cross-examined these experts and put their own experts on the stand in an effort to rebut plaintiffs' expert testimony about reliance, presenting an exhaustive review of the common knowledge available to smokers since the time of Christopher Columbus through a historian, Dr. Norrell, presented as an expert witness on public awareness of smoking. Pet. App. 168a. Defendants cross-examined Plaintiffs' experts about the named plaintiffs' motivations for smoking and other reliance-related issues. *See* Counterstatement, *supra*, pp. 8-9.

After deliberating, "[t]he jury specifically found that there was detrimental reliance on Defendants' omissions and disinformation campaign concerning smoking and health by a class of Louisiana citizens, that there was detrimental reliance on the distorted knowledge concerning the properties of nicotine, *and that such reliance was reasonable*." Pet. App. 46a (emphasis added).

What the Court of Appeal did not require, however, is proof of reliance by the two class representatives. Pet. App. 49a. Evidence of such reliance was irrelevant, the court concluded, "because the information upon which plaintiffs could rely to make an informed decision was severely lacking due to defendants' misrepresentations." *Id.* Given that in cases concerning omissions, fraud "results precisely from defendant's reliance on [plaintiffs] ignorance," it would have been "artificial" to require Plaintiffs in this case to prove individualized reliance on a non-disclosure. *See also Basic, Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (citations omitted) (observing that requiring a plaintiff to show how he would have acted if omitted material information had been disclosed or if the misrepresentation had not been made places an "unnecessarily unrealistic evidentiary burden" on a plaintiff).

The Louisiana courts plainly followed Louisiana law, applicable to individuals and classes alike, and courts have not held the Due Process Clause to require a departure from that law. The Petition should be denied, as it fails to meet this Court's criteria for the exercise of its discretion.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

February 2, 2011

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APPENDIX

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Appendix A:

Constitutional & Statutory Provisions

Louisiana Civil Code
Art. 2315. Liability for Acts Causing Damages

A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged.

Supreme Court, U.S.
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No. 10-735

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND
ALL OTHER PERSONS SIMILARLY SITUATED,
Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

On June 20, 2011, this Court issued its opinion in *Wal-Mart Stores, Inc.* v. *Dukes*, No. 10-277, reversing the Ninth Circuit's decision and holding that class certification in that case violated Federal Rule of Civil Procedure 23. In light of that ruling, the question here is simply whether the Court should (1) grant plenary review, or (2) grant the petition, vacate the decisions below, and remand this case for further proceedings. The former course is clearly the proper one. Indeed, this Court's decision in *Wal-Mart* makes plenary review here even more imperative.

By resting its decision on Rule 23 and the Rules Enabling Act, this Court in *Wal-Mart* avoided the need for a ruling on the constitutional limits on the use of class actions to adjudicate claims fundamentally ill-suited for class treatment. At the same time, by recognizing restrictions on the use of class actions in federal courts, the Court increased the incentives for class-action lawyers to push the limits in state court. The need for clarification of the constitutional limits on deviations from the representational model of class litigation is thus more pressing than ever.

This case is an ideal vehicle for providing such clarification: The decisions below reflect a radical deviation from the model of class-action litigation reflected in the conception of Rule 23 reaffirmed in *Wal-Mart*. What the requirement of commonality and the strictures of the Rules Enabling Act would flatly forbid in federal court was openly embraced in the decisions below. Procedure was allowed to trump substantive rights and distinct features of individual claims—for example, that the class representatives

could not show reliance on any defendant's action and had quit smoking prior to trial—were ignored to facilitate adjudication on a class-wide basis. In *Wal-Mart*, the Court made clear that this could not happen in federal court. This Court should grant plenary review to decide whether due process will allow this to transpire in state court.

1. Although both sides in *Wal-Mart* argued due process principles (see, *e.g.*, Pet. Br. 15, 36, 38, 43, 47, 55, 56; Resp. Br. 41, 47-48, 52-54; Pet. Reply Br. 14, 17-18, 20), the Court's opinion resolved the issues presented principally on the basis of Rule 23 itself. More particularly, the Court first held that the plaintiffs had failed to demonstrate commonality, as required by Rule 23(a)(2). Slip op. 8. The Court noted the plaintiffs' inability to identify a common reason *why* individual employees had suffered allegedly adverse employment action, and the Court pointedly rejected plaintiffs' reliance on "statistical and anecdotal evidence" to fill that void. *Id.* at 16. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity," the Court concluded, "does not suffice." *Id.* at 17.

The Court further held (unanimously, in this regard), that the plaintiffs' "claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2)." Slip op. 20. The Court concluded that adjudicating such claims would impermissibly evade the protections Rule 23(b)(3) affords to monetary claims, explaining that the "absence of notice and opt-out" procedures for monetary claims litigated under (b)(2) "violates due process." *Id.* at 23. The Court declined to decide, however, "whether there are any forms of 'incidental' monetary relief that are consistent with [its] interpretation of Rule 23(b)(2) and that comply with the Due Process

Clause," because the plaintiffs had not contended that they could meet such a standard. *Id.* at 26. The Court also unanimously declared that "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay" (*ibid.*), rejecting the Ninth Circuit's proposal to "replace" an actual individualized determination "with Trial by Formula" (*id.* at 27). Such proceedings, the Court explained, would violate the Rules Enabling Act's express prohibition against "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Ibid.* (quoting 28 U.S.C. § 2072(b) and citing *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999)).

2. Because the *Wal-Mart* decision relied principally on Rule 23, the important and recurring federal constitutional issue presented in this case—"Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims" (Pet. i)—remains unresolved. The obvious incentives the decision creates to move the most radical of class action theories to state court makes resolution of that question more critical than ever.

To be sure, the foundations of Rule 23 are constitutional (see, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 626 n.20 (1997)), and the unanimous portion of the Court's opinion in *Wal-Mart* confirmed as much (slip op. 26). One of Rule 23's critical features that keeps federal class actions within constitutional bounds is that it confines class actions to contexts in which mass adjudication is truly representative. Only if the trial of the class representatives' claims really does suffice to try those of absent class members will *all* parties—

plaintiffs and defendants alike—be afforded the opportunity to be heard that is at the very core of due process. See Pet. 14-19. The robust requirements of commonality embraced by *Wal-Mart* (together with the related principles of typicality, slip op. 8, n.5) play a critical role in ensuring class action litigation is truly representative litigation, as due process requires.

By its terms, however, Rule 23 of course does not squarely govern state proceedings. Nor does the Rules Enabling Act, which played a critical role in this Court's Rule 23(b) holding. There clearly are constitutional limits on the extent to which the class-action device can be used to deviate from the traditional model of representational litigation. The *Wal-Mart* decision confirms this. And the decisions below plainly crossed the constitutional line. The *Wal-Mart* decision only increases the need for this Court to weigh in and clarify what the Constitution permits when state courts sanction class actions that Rule 23 and the Rules Enabling Act would clearly forbid.

Large numbers of class actions continue to be filed in state courts, which have demonstrated a persistent willingness to deviate from traditional methods of adjudication. See Pet. 31; DRI Br. 12-14; U.S. Chamber Br. 14-16. The Court's holding in *Wal-Mart*—prohibiting those same class actions in federal courts—will only exacerbate that trend. That is particularly true given *Wal-Mart*'s explicit recognition that "individualized determinations" (slip op. 26) and "individual affirmative defenses" (*id.* at 27) cannot be cast aside just to facilitate class adjudication. State courts will inevitably face still greater numbers of lawsuits seeking to employ this and similar tactics to accommodate class actions that

have no home in federal court. "The extent to which class treatment may constitutionally reduce the normal requirements of due process" therefore remains "an important question." *Philip Morris USA, Inc.* v. *Scott*, No. 10A273, slip op. at 3 (U.S. Sept. 24, 2010) (Scalia, J., in chambers).

Moreover, there is little reason to believe that the Louisiana courts will heed the example laid out in *Wal-Mart*—if they are willing to reconsider their prior holdings at all. Indeed, notwithstanding the due process concerns that animate Rule 23, respondent here has repeatedly denied that the lessons of Rule 23 suggest any meaningful limitation on what state courts may do in the name of adjudicating a class action (see, *e.g.*, Br. in Opp. 1 n.1, 18-19; Stay Opp. 18), and the lower courts have consistently ignored such guideposts. As previously explained (Pet. 4-12), petitioners have vigorously advanced their due process rights at every turn—including through multiple trips to the Court of Appeal and the Louisiana Supreme Court. Petitioners have also repeatedly invoked Rule 23's example to illustrate the constitutionally adequate path. All to no avail: The decisions below simply gave these arguments the back of the hand, or ignored them altogether. See, *e.g.*, Pet. App. 46a-50a, 199a-200a.

* * *

Wal-Mart rightly concluded that Rule 23 does not countenance radical departures from the essential representative character of a traditional class action simply to make mass adjudication "work." The Court should take this valuable opportunity—in a rare class action case tried to final judgment—to make clear that due process likewise prohibits state courts from abandoning the essential principles of class

adjudication by simply lopping off elements and defenses that would indisputably apply in an individual adjudication. That question remains more pressing than ever, and the state courts remain badly in need of explicit guidance from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set down for argument next Term.

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND ALL OTHER PERSONS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

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RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEF OF PETITIONERS

Philip Morris's supplemental brief in support of its Petition for a Writ of Certiorari treats the instant case as if it were a hypothetical one that merely applied, in Louisiana, the flawed rulings of the Ninth Circuit that this Court identified in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, slip op. (U.S. June 20, 2011). The characterization is as inaccurate as it is fanciful, for the Louisiana courts followed a wholly different analysis, applied wholly different state law, and provided Philip Morris with extensive interlocutory appellate review throughout the 14 years this case was in litigation in Louisiana. *See* Br. in Opp. 1-6.

Moreover, contrary to Philip Morris's claim that this case is prototypical of a vast number of state class actions that lack the types of protections inherent in the federal rules, the Louisiana courts accorded great care in protecting Philip Morris's interests and repeatedly acknowledged that this matter was "unique." *See, e.g.*, Pet. App. 20a (quoting Pet. App. 265a). Because of the vast differences in the law applied by the courts below, the underlying common issues of fact and law that led to certification *in 1997*, and the non-monetary relief sought and awarded, this case does not present a certworthy issue to the court, nor does it deserve further delay in instituting the smoking-cessation services ordered below through an order to grant, vacate and remand to an intermediate Louisiana court for further rounds of reviews.

In the last week, this Court has now twice rejected entreaties similar to that of Philip Morris to

treat the requirements of Federal Rule of Civil Procedure 23 as though they are requirements of state courts. In *Smith v. Bayer Corp.*, No. 09-1205, slip op. (U.S. June 16, 2011), this Court recognized that even identically worded state rules are not necessarily coterminous, particularly where the state courts have articulated a different approach. *Id.* at 8-12. And, in *Wal-Mart*, despite briefing and argument on due-process requirements, this Court restricted its ruling to the applicability of federal Rule 23. This Court should again reject the invitation to conflate Rule 23 with Due Process.

Indeed, this Court has repeatedly rejected the claim that Rule 23 is the only method compatible with Due Process to prosecute a class action. In asking that this Court use this case as a vehicle for more assiduously enforcing Rule 23 as if it were constitutionally mandated and thus equally applicable to the States, Philip Morris ignores this Court's consistent holdings that the Due Process Clause does not "compel the [States'] adoption of the particular rules thought by this court to be appropriate for the federal courts." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Even the case Philip Morris cites for the proposition that Rule 23 is based on a constitutional foundation, Pet'rs' Supp. Br. 3, announces that "fidelity to the Rules Enabling Act," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997), is not a requirement of state class actions. Instead, states remain "free to develop their own rules for protecting against . . . the piecemeal resolution of disputes," and only overstep this authority when they adopt "extreme applications" "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996). No such

fundamental federal right has been asserted by Philip Morris.

Philip Morris attempts to find some comfort in this Court's statement in *Wal-Mart* that suggests a due-process connection to its back-pay ruling. Pet'rs' Supp. Br. 2. Even here, however, Philip Morris takes this Court's language out of the limited context in which it made the statement. In noting that notice and opt-out are due-process requirements, the *Wal-Mart* opinion plainly states that this is so "[i]n the context of a class action predominantly for money damages." Slip op. at 23. Of course, notice and an opportunity to opt-out were provided to the Plaintiffs here. Yet, this case is not a claim for money damages, but for smoking-cessation services, administered by the court.

Because of the nature of the relief ordered, establishment of a court-administered smoking-cessation program, rather than monetary relief of the type at issue in *Wal-Mart*, *see* Pet. App. 28a, there is no application of this Court's analysis of the availability of Rule 23(b)(2) certification for monetary damages, either as a matter of the federal rules or as a matter of federal due process.

Finally, as observed by the court below:

> The ten-year remedy fashioned by the jury, and later approved by this court, has not yet begun. Not a single habitual smoker has yet benefitted from the program. The beneficiaries are aging. Dr. Naseta, whom the tobacco companies called as an expert witness at the jury trial, testified that every

> smoker should stop smoking and every habitual smoker would benefit from the cessation program. Further delay in rendering judgment will unnecessarily and, more importantly, unfairly impair the possibilities of aging smokers to cease their habits and to surely improve their own lives, not to mention the lives of their family members and co-workers.

Pet. App. 19a.

Further delay in implementing a program found necessary to save thousands of lives from the ravages of smoking addiction is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Date: June 21, 2011

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The petition demonstrated that the question presented—whether state courts may employ the class-action device to eliminate fundamental substantive and procedural protections applicable to adjudications of class members' individual claims—is nationally important, recurring, and the subject of conflicts in the lower courts. Plaintiffs' opposition is largely an exercise in distraction and misdirection. Attempting to create an alternative basis for the judgment, plaintiffs invoke causes of action that they never presented to, or were *rejected* by, the jury. Most egregiously, they now say they prevailed on a cause of action distinct from their failed product defect claim (and purportedly based on La. Civ. Code art. 2315) for "nicotine manipulation and addiction." But there is no such freestanding claim in the jury instructions, verdict form, decisions below, or plaintiffs' prior submissions to this Court. Plaintiffs grossly mischaracterize our petition, devoting pages to attacking arguments we never advanced—including that the Due Process Clause forbids States from *prospectively* eliminating reliance for individual and class claims alike. And they conjure up purported "misstatements" that demonstrate only their own infidelity to the record.

The reason for plaintiffs' diversionary strategy becomes obvious on page 30, when they finally turn to the Louisiana Court of Appeal's holding: They have no answer to what that court actually said, other than a transparent attempt to rewrite both the opinion and Louisiana fraud law. Nor do they dispute that due process requires that named plaintiffs fully represent absent class members; they just assert—wrongly—that such representation need

not encompass *weaknesses* in those plaintiffs' claims. Finally, plaintiffs do not deny that this case affords a rare opportunity to review a class action tried to final judgment in the state courts. Certiorari is plainly warranted and urgently needed.

A. The Courts Below Eliminated Individualized Reliance To Facilitate Classwide Adjudication

After many detours, plaintiffs argue (Opp. 29-35) that Louisiana law does *not* require proof of individualized reliance and causation as elements of a fraud claim, even for those suing individually. The decision below, they say, was merely "imprecise" in stating otherwise. Opp. 30. There was nothing "imprecise" about the decision below: It dispensed with the need to show individualized reliance because—and only because—this was a class action.

1. The Court of Appeal expressly recognized that Louisiana fraud law "requires causation in the form of reliance." Pet. App. ("App.") 46a. It then relieved plaintiffs of that burden, however, because this was a class action. Plaintiffs could avoid proving reliance by any real person, the court held, and instead prove only an imaginary construct it called "reliance by the class as a whole." *Ibid.*

The trial court likewise ruled that "individual reliance is not an issue" because plaintiffs had sued on behalf of "the class as a whole" for "a single, common" court-supervised fund. App. 222a. It specifically instructed the jury that "*in this case*" plaintiffs "do *not* have to establish *individual reliance on specific concealments or misrepresentations* allegedly made by these defendants," even though "Louisiana law" requires proof that the fraud "caus[ed] justifiable reliance with resultant injury." 2003-7-24

Tr. 23506 (emphasis added). Instead, the court declared, "reliance" by the class as a whole on a "distorted body" of "public knowledge" sufficed. *Id.* at 23507.

Confirming their departure from settled Louisiana fraud law in order to facilitate classwide adjudication, both lower courts observed that individual reliance would be an essential element of liability if class members were asserting fraud claims individually for other compensatory relief. App. 46a, 222a. It is difficult to imagine a clearer and more flagrant declaration that the class-action vehicle permits the abandonment of established liability elements and defenses that would apply to any individual plaintiff's claims.

2. According to plaintiffs, the Court of Appeal held that Louisiana law eliminates the traditional element of reliance in fraud cases whenever (1) the "fraud occurred by concealment, suppression, or omission," or (2) compensatory relief would take the form of a fund "administered by the court." Opp. 29-30. But as demonstrated by the jury instructions quoted above (which refer to *both* "concealments" *and* "misrepresentations"), Louisiana law does not limit the reliance requirement to cases involving affirmative misrepresentations. (In any event, much of plaintiffs' case at trial turned on alleged affirmative misrepresentations.) And the remedy sought does not *ipso facto* excuse a fraud plaintiff from proving certain elements of her claim. Notably, plaintiffs do not cite a single case suggesting that either distinction could justify eliminating an element of a claim.[1]

---

[1] Plaintiffs seek to generate confusion by suggesting that due process does not prevent a State from imposing an objective

3. Plaintiffs mistakenly claim that *Mire* v. *EatelCorp., Inc.*, 849 So. 2d 608 (La. Ct. App. 2003), and *Banks* v. *New York Life Ins. Co.*, 737 So. 2d 1275 (La. 1999), permit reliance to be established on a classwide basis. Opp. 32-33. *Mire* held that reliance is *not an element* of a claim for "redhibition," which requires proof that a product was unfit for its intended purpose. 849 So. 2d at 614. No redhibition claim was tried here, and *Mire* says nothing about Louisiana fraud law. Nor does the Court of Appeal's brief discussion of *Banks* (App. 46a) support the non-existent rule of Louisiana fraud law proposed by plaintiffs. The distinction of *Banks* came immediately after the court's clear statement that the reliance necessary in an individual case could be dispensed with in this class action. The court simply underscored that *Banks*—a case *defendants* relied on—was not an obstacle to its novel conclusion.

B. Plaintiffs Misunderstand The Representational Function Of A Proper Class Action

Plaintiffs argue that whether the decisions below stripped this class action of its essential representative character is not an "issue of great national importance," implicates no conflict, and is not "presented by the proceedings in this case." Opp. 20. That argument rests on a misconception of the basic representational requirement of a class action.

According to plaintiffs, a class action is sufficiently representative if the named plaintiff is an

---

"reasonable-person reliance standard" or allowing proof of reliance through expert testimony. Opp. 30-34 (citing only non-Louisiana cases). Those issues are irrelevant, however, because the Court of Appeal unconstitutionally excused plaintiffs from proving individualized reliance of any variety or by any means.

unconflicted "member of the class at the time the class is certified" and subsequently pursues the absent plaintiffs' interests "vigorous[ly]." Opp. 20, 22. Plaintiffs' formula for representativeness omits half of the equation. A class action requires not only an adequate representative, but also a representative trial of some class member's claim. This requirement guarantees the *defendants'* right to *contest* liability through the class representatives. See Pet. 18. Only when class representatives are a vehicle for fully exploring their own and the absent class members' claims—warts and all—can a trial of the representatives' claims suffice to adjudicate everyone's claims, and only if the trial is conducted in a way that preserves that representative function. That is what it means for a defendant to be able "to present every available defense." *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (internal quotation marks omitted). If, as here, weaknesses in the named plaintiffs' individual claims are simply assumed away at trial, then even a "typical" plaintiff cannot fulfill her full representative function.

Plaintiffs' misconception of representational litigation also leads them to misunderstand decisions like *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), that establish a clear split among the lower courts. That case did not address only "conflicts of interest within the class and statute of limitations defenses." Opp. 22. It also held that "the reliance element of plaintiffs' fraud" claims was "not readily susceptible to class-wide proof" because those claims "turn[ed] on whether each [plaintiff] reasonably relied on [the defendant's]

representations." 155 F.3d at 341. Plaintiffs say nothing about that holding.[2]

Plaintiffs do not dispute that *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), rejected use of the "class as a whole" device to eliminate reliance, but say that *McLaughlin* "is 'no longer good law.'" Opp. 29 (quoting *Spencer* v. *Hartford Fin. Servs. Group, Inc.*, 256 F.R.D. 284, 297 (D. Conn. 2009)). Plaintiffs are wrong. The Second Circuit recently reaffirmed *McLaughlin*'s holding. *UFCW Local 1776* v. *Eli Lilly & Co.*, 620 F.3d 121, 132-36 (2010).[3]

C. The Denial Of Cross-Examination Underscores The Radical Deviation From The Model Of Representative Litigation

Plaintiffs cannot dispute that defendants were denied a full and fair opportunity to cross-examine the class representatives, so they are reduced to dismissing that error as "harmless." Opp. 23. That remarkable view rests on their mistaken assumption that the class-action device justified dispensing with ordinary requirements of Louisiana law. Because

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[2] Plaintiffs ultimately acknowledge "the conflict between *Broussard* and other federal circuits" but contend that the conflict does not implicate States' "implementation of their own class-action requirements." Opp. 22. As previously explained (Pet. 18-19) and not disputed by plaintiffs, however, Federal Rule 23 requirements are grounded in due process.

[3] Plaintiffs ignore *Avery* v. *State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), and *Bell* v. *Farmers Ins. Exchange*, 9 Cal. Rptr. 3d 544 (Cal. Ct. App. 2004). See Pet 20-21. Likewise, plaintiffs do not dispute that the procedures approved below are similar to devices approved by other state courts. See Pet. 29-31; U.S. Chamber Br. 14-16. This Court's review would thus provide widely needed guidance.

those requirements were eliminated, defendants were held liable for misleading class members without a single plaintiff ever testifying and facing cross-examination as to whether he or she was actually misled—an especially egregious omission where the named plaintiffs' pretrial admissions *disproved* that they had been misled. It is impossible to comprehend how the denial of cross-examination here could be labeled "harmless."

Plaintiffs' contention that the class representatives' testimony was "[p]erhaps" cumulative (Opp. 24) is also baseless. Class representatives are not merely alternative sources of evidence. They are direct proxies for the absent class members' claims, and the only means by which defendants may exercise their fundamental right to cross-examination. There is no conceivable substitute for the class representatives' concessions that they did not recall being exposed to or influenced by the defendants' alleged misrepresentations, that they had been warned about and understood the health risks of smoking decades earlier, and that they had themselves quit smoking years earlier.[4]

---

[4] Plaintiffs' suggestion (Opp. 19) that the class representatives' decision to quit smoking before trial did not require *decertification* misses the point. The problem is that no representative plaintiff was ever cross-examined on this and other highly relevant subjects. That denial precluded defendants from (among other things) making clear that—even as the plaintiffs claimed to need a smoking cessation program—the class representatives had already quit.

D. None Of Plaintiffs' Distortions Or Distractions Diminishes This Case As A Vehicle

1. Unable to mount a serious defense of the decision below, plaintiffs offer three flimsy reasons why the petition supposedly requests an "advisory opinion." Opp. 11-16.

First, plaintiffs say that the "cause of action based on nicotine manipulation does not require reliance." Opp. 11. But there *is no independent cause of action* for "nicotine manipulation" under Louisiana law, and none is mentioned in the jury instructions or verdict form. 2003-7-24 Tr. 23493-94, 23505-19; App. 234a-51a. The general questions at the beginning of the verdict form that refer to nicotine and addiction were germane to the *product defect claim*, which the jury *rejected*. App. 226a-30a. Plaintiffs misleadingly cite La. Civ. Code art. 2315 to suggest that it supplied a cause of action for nicotine manipulation. Opp. 11-12. But Article 2315 is Louisiana's general statute underlying *every* tort claim; it does not define a specific cause of action. See, *e.g.*, *Veazey* v. *Elmwood Plantation Assocs.*, 650 So. 2d 712, 717 (La. 1994) (Article 2315 is "the fountainhead of tort responsibility in Louisiana") (internal quotation marks omitted). There was thus no mention of any independent "nicotine manipulation and addiction" claim in plaintiffs' complaint; in the Louisiana Court of Appeal's opinions; in plaintiffs' recent stay opposition; or in plaintiffs' prior brief in opposition in this Court. See R.1:1-2, 19-28; App. 263a n.1; Pet. 11 n.3; 07-1272 Opp. 2-3 & n.2.

Second, plaintiffs contend that under Louisiana law a "medical monitoring" claim can be brought as a class action without "proof of reliance." Opp. 15. But

the jury here *rejected* the medical monitoring claim. App. 34a, 255a-57a. In any event, medical monitoring under Louisiana law is merely an element of *damages* "when the plaintiff establishes liability under traditional tort theories of recovery." *Bourgeois* v. *A.P. Green Industries, Inc.*, 716 So. 2d 355, 362 (La. 1998).

Third, plaintiffs assert that, on their assumed-duty claim, reliance is "merely an alternate condition precedent to liability." Opp. 14-15. But the Court of Appeal *rejected* this argument. Defendants argued below that "there was no proof or jury finding that established the necessary causation and other elements of an 'assumed duty' claim." App. 46a. Rather than suggesting that proof of reliance and causation was unnecessary for the assumed-duty claim, the Court of Appeal held that "causation and reliance were adequately proven," App. 48a, because "the only question of reliance pertains to the reliance by the class as a whole," App. 46a. The Court of Appeal correctly recognized that plaintiffs' assumed-duty claim was functionally equivalent to the fraud claim. Compare App. 244a-46a with *id.* at 234a-38a.[5]

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[5] Tellingly, in their stay opposition plaintiffs never suggested that reliance was unnecessary as to *any* of their claims; they argued only (but erroneously) that reliance had been sufficiently proven. Stay Opp. 5-6. In addition, insofar as plaintiffs' assumed-duty theory rested on a supposed duty to refrain from marketing to minors, that claim could not possibly support the verdict. Even according to plaintiffs' experts, the class encompassed many individuals who did *not* start smoking as minors. See Pet. ii; 2003-3-13 Tr. 15965-66 (Arnett: 47% started smoking as adults); 2003-2-12 Tr. 13750 (Cummings: 20%). And proof of a causal nexus for such a claim—*i.e.*, reliance by minors on advertising—was still necessary.

Even if these flawed rationales had merit, plaintiffs do not (and cannot) suggest that the Court of Appeal actually relied on any of them. Accordingly, plaintiffs do not (and cannot) claim that any would qualify as an adequate and independent state-law ground for the judgment below. Plaintiffs' speculation that they might later prevail on these flawed rationales following remand hardly renders "advisory" a decision by this Court invalidating the *actual* basis of the Court of Appeal's decision. Cf. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-31 (1973) (mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground").

2. Plaintiffs spill much ink addressing arguments the petition did not make and responding to imaginary "misstatements."

They contend, for example, that the Due Process Clause does not prevent States from omitting the element of reliance from their fraud law. Opp. 25-29. But the petition did not address a State's authority to define its own tort law *prospectively* for individual and class actions alike. The question is instead whether, to make a case "work" as a class action, state courts may *selectively excuse* class action plaintiffs from proving the element of reliance (and overcoming affirmative defenses) that those same plaintiffs would be required to prove (and overcome) in their individual cases.

Plaintiffs also suggest (Opp. 16-19) that defendants' "ire" is improperly trained on "the limited reach of [CAFA]," the "potential [for] 'bet-the-company' liability" in class actions, or the inapplicability of Rule 23 and the Rules Enabling Act to state

courts. But the absence of effective checks on state-court abuses of the class action device is precisely why the due process issue presented here is so important. See Pet 28-33; U.S. Chamber Br. 4-5, 14-20; DRI Br. 3, 11-12.[6]

Plaintiffs also fault us for omitting mention of their conspiracy claim. Opp. 7. Under long-settled Louisiana law, however, conspiracy is *not* an independent "cause of action" (Opp. 7), but rather is dependent upon—and derivative of—proof of an underlying claim. See *Cogswell* v. *Bd. of Levee Comm'rs of Orleans Levee Dist.*, 35 So. 2d 743, 744 (La. 1948). That dependent status was reflected in both the jury instructions and the verdict form. 2003-7-24 Tr. 23510 ("actionable element" in conspiracy claim "is not the conspiracy itself" but the underlying tort); App. 240a-41a (Questions 31-32).

Finally, among many other misstatements, plaintiffs suggest that the petition somehow leaves a "false impression" that "money has been paid" to the class. Opp. 7. We are at a loss to understand how the petition, coming directly on the heels of a stay application granted by Justice Scalia, could possibly leave such a "false impression."[7]

---

[6] Plaintiffs suggest that the rulings at issue do not violate due process because this litigation has lasted for 14 years and included numerous appeals (taken by both sides) involving other issues. Opp. 17-18 & n.8. The argument is self-refuting. The *Due* Process Clause requires more than process.

[7] This Court should reject plaintiffs' implicit suggestion to deny review because there is an urgent need to fund the cessation program. Even if need for a remedy could justify overlooking a constitutional error (and, of course, it cannot), free cessation services have been available to Louisiana's citizens for years. See Stay Reply 14.

* * * *

At bottom, this case turns on whether the class-action device is a tool for *aggregation* or *transformation* of class members' individual claims. Unabashedly adopting the latter position, the Louisiana courts departed from long-settled principles of due process and from decisions by numerous other courts. The question presented here is nationally important, rarely before this Court on a fully developed record, and urgently in need of resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., et al.,
Petitioners,

v.

DEANIA M. JACKSON,
on behalf of herself and
all others similarly situated,
Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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In re Ford Motor Co. Bronco II Prod. Liability Litigation,
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Scott v. American Tobacco Co.,
949 So. 2d 1266 (La. App. 4 Cir. 2007) .. 3, 9, 12

OTHER AUTHORITY

Bruce Hoffman,
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Mark Moller,
The Anti-Constitutional Culture of Class Action Law, 30 Reg. 50 (Summer 2007) 18

David L. Wallace,
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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party in this case authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioners, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing. Respondent has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

Few issues are of more concern to American business than those pertaining to class certification. The Chamber thus regularly files amicus briefs in significant appeals involving class certification issues, including *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), *cert. granted in part*, --- S. Ct. ---, 2010 WL 3358931 (U.S. Dec. 6, 2010), *Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010), *cert. granted*, --- S. Ct. ---, 2010 U.S. LEXIS 5755 (U.S. Sept. 28, 2010), *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998), and *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), among many others.

The Chamber's members have a strong interest in reversal of the ruling below because the decision of the Louisiana Court of Appeal undermines the fundamental due process rights of American businesses by severely restricting their ability to defend themselves in class action trials. If allowed to stand, the ruling has the potential to dramatically increase the class action exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Louisiana Court of Appeal, Fourth Circuit, upheld class certification and a classwide verdict of $270 million in a suit involving all Louisiana residents who smoked on or before May 24, 1996 and purportedly sought to participate in a smoking cessation program. This class of over 500,000 smokers included individuals who purchased different cigarette

brands, were told different things by the companies that manufactured and sold those cigarettes about the safety or risks of smoking – and knew different things from other sources about the risks of smoking when they began smoking and throughout the time when they smoked. Inexplicably, the case was cleared for class treatment – and the verdict was ultimately upheld – even though the class members presented highly individualized, disparate claims that were subject to individualized affirmative defenses.

Class treatment of respondents' claims was particularly inappropriate because their suit sounded in fraud, a cause of action that requires proof of reliance as a matter of long-established Louisiana law. Although courts across the country have almost uniformly recognized that it is virtually impossible for plaintiffs in consumer cases to satisfy a reliance requirement in a class trial, the court of appeal determined that reliance was no obstacle here. In so concluding, the court reasoned that because defendants had supposedly distorted the "body of public knowledge" and because plaintiffs sought to recover in the form of a common fund, "the causal connection" required for a showing of reliance could simply be established in one fell swoop for "the class as a whole." *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266, 1277-78 (La. App. 4 Cir. 2007), *reh'g denied sub nom. Jackson v. Am. Tobacco Co.*, No. 04-2095, 2007 La. App. LEXIS 437 (La. App. 4 Cir. Mar. 2, 2007) (determining that "individual reliance is not at issue in the instant case"). Thus, the court of appeal approved the jury verdict even though no class member was required to prove the elements of his or her claim at

trial – and even though petitioners were effectively barred from presenting any real defense to the class members' claims.

This Court should grant review for two important reasons. First, review is necessary to curtail state-court abuse of the class action device. This decision is just one of a number of state-court rulings that have used the class action device to eliminate substantive and procedural protections guaranteed by due process. The decision in this case essentially overrides the requirements for asserting a fraud claim under Louisiana law if that claim is pursued as part of a class action rather than individually. Absent reversal, this case would become a leading precedent for the proposition that courts can properly construe a state law to mean one thing in individual suits and another in class actions. And its effects would not be limited to Louisiana. Rather, the verdict – and its affirmance – would send a strong message to state courts across the country that they too can use the class device to abrogate the protections afforded by state substantive law and fundamental due process principles. *See* Ted Frank, *SCOTUS to rule on due process in class actions?*, PointofLaw Forum, Sept. 28, 2010, *available at* http://www.pointoflaw.com/archives/2010/09/scotus-to-rule.php (noting the "tremendous due process problems" created by the "tail-wagging-the-dog aspect of class actions, where the procedural Procrusteanism of creating a class ends up depriving defendants of their ability to mount a substantive defense that they would have to individual claims").

Second, review is necessary to protect the interests and vitality of American businesses. The court of appeal's loose approach to class actions involving alleged fraud – apparently authorizing class treatment whenever a company is alleged to have "distorted the body of public knowledge" – threatens to solidify select state courts as havens for class actions that would be routinely rejected by the federal system. In particular, the ruling invites plaintiffs' attorneys to craft class actions that evade the jurisdictional requirements of the Class Action Fairness Act ("CAFA") and file them in state courts that will bend state law to accommodate class trials. Such a result would have a deeply destructive effect on businesses nationwide. For this reason too, the Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT CLASS PROCEEDINGS CANNOT ABRIDGE DUE PROCESS PROTECTIONS.

The Court should grant review to clarify that a state court violates due process when – in order to facilitate class adjudication – it excuses class representatives from proving a critical element of a cause of action and/or bars defendants from presenting individualized evidence that bears on that element.

As recognized by Justice Scalia's stay order, "this is a fraud case, and in Louisiana the tort of fraud normally requires proof that the plaintiff detrimentally relied on the defendant's misrepresentations." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010)

(Scalia, J., in chambers) (citation omitted). The court of appeal's finding that plaintiffs in this case could be excused from proving individual reliance – and that defendants could be barred from contesting reliance on an individual basis – applied a fraud standard that is substantively different from the one used in the "normal[]" case. The basis proffered by the court of appeal for this departure was the nature of the suit – a class action in which plaintiffs sought relief in the form of a single, court-supervised common fund. But as a substantial volume of caselaw makes clear, such a modification of the substantive requirements of state law to facilitate classwide resolution of disputes does not comport with the minimum requirements of due process.

It is well established that the fundamental fairness guarantee of the Due Process Clause requires a plaintiff to prove every element of his or her claim. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that the elimination or shifting of the burden to prove every element of an alleged offense violated defendant's due process rights); *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983) ("[A] conclusive presumption on [an] issue . . . is the functional equivalent of a directed verdict on that issue."); *In re Winship*, 397 U.S. 358, 364 (1970). Due process thus prevents state courts from eliminating an element of a cause of action and applying that change retroactively to prior conduct – as the court of appeal did in this case. *See Bouie v. City of Columbia*, 378 U.S. 347, 352-54 (1964) (holding that state court's "unforeseeable" and "retroactive" ruling that departed from prior precedent violated due process because, "[i]f a state legislature is barred by the Ex Post Facto

Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result through judicial construction"); *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 1044-45 (E.D. Wis. 2010) ("[T]he constitutional principles [of due process] apply with equal force to the . . . application of a common law rule in a civil lawsuit. The federal guaranty of due process extends to state action through its judicial . . . branch of government. . . . The . . . retroactive application of a common law judicial decision cannot circumvent constitutional implications when the rule expressed by that decision is applied.") (internal quotation marks and citations omitted). Such retroactive modifications are proscribed under the Due Process Clause because they offend a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (citation omitted); *see also Gibson*, 719 F. Supp. 2d at 1046 ("[R]etroactive application of judicial rulings cannot trump due process concerns.").

Due process also protects the right of every litigant "to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citation omitted). As this Court has repeatedly recognized, this due process right requires that defendants have "an opportunity to present every available defense" at trial. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405

U.S. 56, 66 (1972)). The same principle applies in the context of a class action. *See, e.g., Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 489 n.21 (E.D. Pa. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (stating that defendants "cannot receive a fair trial without a process which permits a thorough and discrete presentation of [their] defenses"). For this reason, due process mandates that defendants have an opportunity to assert defenses that apply separately to individual class members, even if they do not apply to the class as whole. *See Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (holding that an overbroad consolidation order may "deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result").

Consistent with these due process principles, courts across the country have repeatedly held that fraud claims are particularly ill-suited for class resolution because under Louisiana law – and the law of other states – each plaintiff must show that he or she relied on the alleged fraud. *See, e.g., Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 320 (4th Cir. 2006) (stating that the "contents of the plaintiff's mind," which is a focal point of fraud suits, "is not readily susceptible to class-wide determination"); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 453-54 (E.D. Pa. 2000); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (denying class certification where "reliance [was] an individualized issue"); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456-57 (D.N.J. 1998); *In re Ford Motor Co. Bronco II*

Prod. Liab. Litig., 177 F.R.D. 360, 374 (E.D. La. 1997) ("[U]nder plaintiffs' common law fraud/misrepresentation theory, each class member would have to demonstrate his individual reliance upon the alleged misrepresentations, causing individual, not common, fact issues to predominate."). Notably, court after court has recognized these principles in cases like this one, denying certification of tobacco-related class actions where plaintiffs would need to demonstrate reliance to prevail at trial. *See, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d at 735; *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 94 (W.D. Mo. 1997).

In rebuffing this line of precedent, the Court of Appeal trampled defendants' due process rights. Although the court began with a proper recognition that proof of plaintiffs' fraud-based claims would require a showing of "causation in the form of reliance," *Scott*, 949 So. 2d at 1277, it quickly veered off-course, attempting to excuse this requirement on the grounds that: (1) defendants had supposedly distorted the "entire body of public knowledge," and (2) plaintiffs sought to establish a common fund to pay for smoking cessation programs, *id.* Neither ground can justify the court's wholesale abrogation of petitioners' due process rights.

Smoking cessation programs are merely forms of relief – not causes of action. Thus, they do not extinguish the requirement that each plaintiff allege and satisfy every element of his or her underlying claim. *See Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 361-62 (La. 1998) ("[A] plaintiff who can demon-

strate a need for medical monitoring has suffered damage" that "is compensable *when* the plaintiff establishes liability under traditional tort theories of recovery") (emphasis added). Nor should it make any difference that plaintiffs dress their allegations of fraud in collective terms – such as distortion of "public knowledge." Fraud claims – in Louisiana and elsewhere – require a showing of individual reliance regardless of how broadly the alleged deception was disseminated. *See Edmundson Bros. P'ship v. Montex Drilling Co.*, 731 So. 2d 1049, 1062 (La. App. 3 Cir. 1999) ("To succeed on their fraud claims, plaintiff must prove a misrepresentation or failure to disclose by [defendant]; [defendant's] intent to deceive; reliance by plaintiff on [defendant]; and resulting loss or damage to plaintiff."); *see also Ford Vehicle Paint*, 182 F.R.D. at 216, 221 (denying class certification because, inter alia, "reliance is an individualized issue" where vehicle manufacturer is alleged to have "fraudulently conceal[ed] a paint defect" in certain vehicles "from the consuming public"); *Bronco II*, 177 F.R.D. at 363-64, 374 (denying class certification and observing that "each class member would have to demonstrate his individual reliance upon the alleged misrepresentations, causing individual, not common, fact issues to predominate" where plaintiffs alleged that defendant sought to "deceive the public concerning the safety" of its product). Accordingly, the mere fact that plaintiffs allege distortion of the body of public knowledge does not obviate the basic requirement that they establish the reliance element of their fraud claims. Were it otherwise, plaintiffs would

merely allege that all frauds "distort[ed] the body of public knowledge," rendering causation or reliance a nullity in all class actions.[2]

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[2] As other courts have explained, theories that seek to eliminate a showing of reliance by pointing to the public dissemination of an alleged misrepresentation are tantamount to "fraud on the market" theories, which are limited to a narrow category of cases in which the plaintiff can prove the existence of an efficient market – like securities. Courts have generally rejected efforts to extend fraud-on-the-market theories to other markets – including those for consumer products – that do not price efficiently. Thus, in those contexts, the question whether an alleged deception had any effect on a buying decision is an inherently individualized one. *See, e.g., Ford Vehicle Paint*, 182 F.R.D. at 221-22 (acknowledging that the vast majority of states have refused to allow a "fraud on the market" theory of reliance in common law fraud cases) (collecting cases); *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 381 (D.N.J. 2004) (acknowledging the impropriety of using "the fraud on the market theory to circumvent the reliance element" in a consumer fraud action); *Brown ex rel. Estate of Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 519 (D.N.J. 2002) (rejecting plaintiff's attempt to use a "fraud on the market" theory of reliance in an action for common law fraud against three tobacco companies for an alleged smoking-related death); *Graham v. Am. Cyanamid Co.*, Nos. C-2-94-423, C-2-94-425, 2000 WL 1911431, at *6 (S.D. Ohio Dec. 21, 2000) (holding that "fraud on the market" theory did not apply to common law fraud claims); *Cofield v. Lead Indus. Ass'n*, No. Civ. A. MJG-99-3277, 2000 WL 34292681, at *10 (D. Md. Aug. 17, 2000) (concluding that securities cases do not "provide a useful analogy in the product/fraud context" and noting "that most courts have refused to extend the 'fraud on the market' *(cont'd)*

Even assuming plaintiffs could make out a prima facie case of reliance based on their "public knowledge" theory, the courts below further violated defendants' due process rights by denying defendants the right to dispute that theory through individualized proof about the circumstances of each plaintiff's cigarette purchases. Most importantly, defendants were unable to question the class representatives (or any other class members) at trial about what information they had regarding the risks of tobacco use and how much – if at all – they relied on such information when deciding whether to purchase defendants' products. *See Scott*, 949 So. 2d at 1278 (recognizing that "the trial court prevented [defendants] from contesting plaintiffs' claims with specific proof" and that "defendants were not allowed to question the class representatives as to . . . whether they relied on the alleged misrepresentations"); 131 S. Ct. at 3 (Scalia, J., in chambers) ("[T]he court eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions and continued to smoke as a result.").[3]

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concept from securities litigation to common law fraud actions").

[3] Notably, the two class representatives– Scott and Jackson (the only class members called by plaintiffs at trial) could not have met their legal burden of proving reliance. Both of them admitted that they started smoking for reasons unrelated to any alleged misstatements or omissions by defendants, and that they stopped smoking *(cont'd)*

Instead, the courts below improperly focused on the purported reliance of the "class as a whole," stitching together a fictional, perfect plaintiff from a quilt of disparate claims. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (reversing class certification where plaintiffs "portrayed the class at trial as a large, uniform group that suffered a uniform, collective injury" and defendant was forced to "defend against a fictional composite without the benefit of . . . cross-examining the disparate individuals behind the composite creation"). Indeed, the trial court threatened to hold defendants' counsel in contempt for raising any questions about individualized issues (2003-03-29 Tr. 17261-62), and prohibited the defendants from cross-examining the class representatives on essential elements and defenses. *See* App. 48-49a (determining that this denial of the right to cross-examine was "harmless error"). Because these limitations deprived defendants of viable defenses, defendants were not afforded an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 33 (citation omitted).[4]

(cont'd from previous page)
years before trial. (2003-03-27 Tr. 17360-63; 2003-03-31 Tr. 17510-15; 2003-03-27 Tr. 17274-82, 17366, 17391-92; 2003-03-31 Tr. 17448-54, 17476, 17483-84.)

[4] Defendants were also denied due process when they were barred from presenting individualized evidence on their affirmative defenses of comparative fault and prescription. *See SEC v. Elliott*, 953 F.2d 1560, 1567-68 (11th Cir. 1992) (holding that defendants were denied due process because they were not afforded the chance to pre-
(cont'd)

The decision of the court of appeal sets a dangerous precedent. The effect of the decision, as the stay order recognized, is "that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." 131 S. Ct. at 4 (Scalia, J., in chambers). Unfortunately, Louisiana is not alone in embracing such an approach. In West Virginia, the state Supreme Court has stated that once a class is certified, the defendant is barred from asserting any defenses to individual claims. *See, e.g., Perrine v. E.I. Du Pont de Nemours & Co.*, 694 S.E.2d 815, 854 (W. Va. 2010) ("To the extent that this class action was properly certified by the trial court, *all of* [defendant's] individualized [defenses] have no merit.").[5] In Missouri,

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sent available affirmative defenses); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370-71 (D.N.J. 1987) (holding, in a class action suit brought by over 1300 company employees, that "[t]o proceed without permitting [defendant] to raise" affirmative defenses particular to each plaintiff would "deprive defendant of the Fifth Amendment right to due process").

[5] Trial court judges in West Virginia are struggling to understand whether this precedent is intended to bar defendants from introducing any plaintiff-related evidence in class action trials. In one pending class action involving alleged dioxin exposure from chemical plants, the judge hesitated for several months as to whether the defendant should even be allowed to obtain blood samples from the named plaintiffs in discovery. In his original order denying the request, the judge held that "independent medical exams are an example of individual evidence that

(cont'd)

courts have held that one common issue suffices to satisfy the predominance requirement, *Plubell v. Merck & Co.*, 289 S.W.3d 707, 713 (Mo. Ct. App. 2009), setting the stage for class trials that cannot be conducted consistently with due process. And in Arkansas, the state Supreme Court has rejected virtually all arguments by defendants in opposition to class certification, holding that "[c]hallenges based on the statutes of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." *Arkansas Media, LLC v.*

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would be without merit in a class action." *See* Order Denying Defs.' Mot. At 7, *Bibb v. Monsanto Co.*, No. 04-C-465 (Cir. Ct. Putnam County, W. Va. May 20, 2010). The judge also noted that "class actions favor focusing on the issues of the class as a whole rather than the individual class members in order to practically and economically resolve the rights of a large number of claimants." *Id.* Although the court has since allowed the tests to go forward, *see* Tr. 43:1-5, *Bibb v. Monsanto Co.*, No. 04-C-465 (Cir. Ct. Putnam County, W. Va. Sept. 8, 2010), the judge has not indicated that he will admit them at trial, and plaintiffs continue to argue that allowing evidence at trial about the named plaintiffs would violate controlling West Virginia Supreme Court law, *see, e.g.*, Pls.' Resp. To Defs.' Mot. To Require Class Reps. To Produce Blood Samples And Alternative Mot. To Certify Questions Of Law To The Supreme Court Of Appeals Of W. Va., *Bibb v. Monsanto Co.*, No. 04-C-465 (Cir. Ct. Putnam County, W. Va. Aug. 18, 2010).

Bobbitt, 2010 Ark. 76, 12 (Ark. 2010) (citations omitted). Notably, Arkansas has never established a process for individualized adjudication in class action trials of "those issues [that] go to the right of a class member to recover," *id.*, and defendants have generally gone straight from the Arkansas Supreme Court to the settlement table, lest they face the due process deprivations that occurred here.

In sum, this Court's intervention is needed to clarify a critical proposition that has long been recognized by federal district courts and courts of appeal: due process rights cannot be sacrificed merely because a plaintiff wishes to aggregate substantial numbers of claims in a class or mass action. *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (invalidating trial plan in a mass consolidated proceeding on due process grounds); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (reversing district court's consolidation of 48 asbestos cases and holding that "[t]he benefits of efficiency can never be purchased at the cost of fairness"); *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1348 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010) ("[T]his Court may not manipulate established procedural and substantive law in the interests of expediting the progress of this litigation. To do so would be to perpetrate an independent constitutional violation. . . . This Court will not sacrifice the fundamental right of due process upon the altars of expediency, thrift, and 'pragmatism.'") (citations omitted). For this reason alone, review should be granted.

II. ABSENT REVIEW – AND REVERSAL – THE COURT OF APPEAL'S RULING WILL ENCOURAGE THE FILING OF ABUSIVE CLASS ACTIONS IN STATE COURTS, CREATING GRAVE RISKS FOR BUSINESSES.

Review is also needed because the relaxation of class certification requirements endorsed by the court of appeal's ruling would set a dangerous precedent for state courts across the nation. In particular, it would send a strong message to plaintiffs' counsel that class certification is readily available in state courts, regardless of how individualized the proposed class members' claims might be – and that trials of such cases will not require plaintiffs to prove the elements of their claims. Although Congress attempted to rein in state-court class action abuse by enacting CAFA, there are many pre-CAFA cases that continue to wind their way through state-court systems around the country. Moreover, the lure of class trials like the one at issue here will encourage plaintiffs' counsel to devise class actions that fall within CAFA's jurisdictional exceptions and file them in plaintiff-friendly state courts, wreaking havoc on American businesses and industries. *See* 131 S. Ct. at 4 (Scalia, J., in chambers) (noting that the *Scott* suit "typifies the sort of major class action that often will not be removable, and in which the constraints of the Due Process Clause will be the only federal protection").

Notably, the plaintiffs' bar has already hailed the *Scott* litigation as a "trailblazer" that will pave the way for the certification of lawsuits that heretofore would have been deemed unsuitable for certification.

Press Release, Tobacco Products Liability Project ("TPLP") (Apr. 28, 2010), *available at* http://www.phaionline.org/2010/04/28/louisiana-court-of-appeals-orders-tobacco-companies-to-pay-over-230-million-for-court-approved-smoking-cessation-program/ (quoting Richard A. Daynard, founder of TPLP). And the effects of such suits would stretch far beyond the tobacco industry. After all, the approach adopted by the courts below could be applied in virtually any sector of the U.S. economy – paving the way for unconstitutional class action trials against automotive, pharmaceutical, technology and insurance companies. Across these sectors, class members would be able to prevail on fraud claims regardless of whether they satisfy the fundamental requirements for proving fraud, and defendant businesses would be denied their due process right to a fair trial.

The business implications of class action abuses – like those countenanced by the courts below – cannot be overstated. It has long been recognized that loose certification standards have serious repercussions for American business. In particular, loose certification raises the stakes of litigation and the risk of gargantuan verdicts. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, 30 Reg. 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so.").

Indeed, "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs, of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 GEO. J. LEGAL ETHICS 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases. David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Product Liability Law & Strategy (Feb. 2009). Left unreviewed, the rulings below will only exacerbate these problems, sending the message that class certification is only the beginning of a defendant's woes. It is hard to imagine a defendant that would not feel intense pressure to settle a case, knowing that it faces a trial in which plaintiffs will not be forced to prove core elements of their claims, while the defendant will be threatened with contempt for seeking to cross-examine the plaintiffs about the facts underlying their allegations.

As Justice Scalia recognized in his stay order, state courts have become a "national concern" because they are breeding grounds for abuses of the class action device. *See* 131 S. Ct. at 4 (Scalia, J., in chambers); *see also* American Tort Reform Foundation, Judicial Hellholes (2010/2011), *available at* http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf (identifying state courts where judges systematically apply laws and court proce-

dures in an unfair and unbalanced manner against defendants in civil lawsuits). This case presents the perfect opportunity for the Court to clarify that federal due process principles prohibit states from using the class action device to water down elements of substantive law, displace the burden of proof that ordinarily applies in an individual action, and deprive defendants of the ability to defend themselves at trial. Such clarification is critical for American businesses, the American economy – and the integrity of our judicial system.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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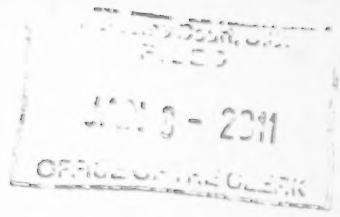

No. 10-735

In the

Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND
ALL OTHER PERSONS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari
to the Louisiana Fourth Circuit Court of Appeal

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Cowen v. Bank United
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Goldberg v. Kelly
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Hansberry v. Lee
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Hughes v. State of Washington
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Lindsey v. Normet
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Logan v. Zimmerman Brush Co.
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Loretto v. Teleprompter Manhattan CATV Corp.
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Lucas v. South Carolina Coastal Council
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McLaughlin v. American Tobacco Co.
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Newsweek, Inc. v. Florida Dep't of Rev.
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Nickey v. Mississippi
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Palisades Collections LLC v. Shorts
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Pennoyer v. Neff
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Philip Morris USA Inc. v. Scott
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Philip Morris USA v. Williams
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Phillips Petroleum Co. v. Shutts
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Richards v. Jefferson County, Ala.
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Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.
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Stevens v. City of Cannon Beach
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Webb's Fabulous Pharmacies, Inc. v. Beckwith
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Other Authorities

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Federal Judicial Center, *Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts* (Nov. 2007) 13

ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION (Feb. 2010) 21

ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000-2006: FIRST INTERIM REPORT (Mar. 2009) 13, 14

HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) 19

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits* 51 DUKE L.J. 1251 (2002) 14

Steven B. Hantler, Victor E. Schwartz, Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media* 13 COMMLAW CONSPECTUS 7 (2004) 17, 18

Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals For Private Gain, Executive Summary* (Rand Inst. for Civ. Justice 1999) 21

Louis W. Hensler, *Class Counsel, Self-Interest and Other People's Money* 35 U. MEM. L. REV. 53 (2004) 16

Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco 75 VA. L. REV. 295 (1989) 20

Jonathan T. Molot, *A Market in Litigation Risk* 76 U. CHI. L. REV. 367 (2009) 18

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*
84 N.Y.U. L. REV. 97 (2009) 14, 20

Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*
35 W. ST. U. L. REV. 193 (2007) 13

Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*
34 WASH. & LEE L. REV. 1043 (1977) 7

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*
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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of defense attorneys, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system more fair, efficient, and—when national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases, like this one, that raise issues important to its membership, their clients, and the judicial system. This case is paradigmatic. To make this case "work" as a class action, the Louisiana courts simply dispensed with the requirement that the plaintiffs prove an essential—and inherently individualized—element of their fraud claims. Not surprisingly, distorting substantive law in this way in order to make class treatment feasible can have a considerable, and even dispositive, effect on countless class actions in virtually all contexts—contract, business tort, product liability, employment, insurance, securities, antitrust, etc. This Court's

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[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from DRI, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Pursuant to Supreme Court Rule 37.2(a), DRI further certifies that counsel of record for both parties received timely notice of DRI's intent to file this brief. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

review is essential to prevent improper forum shopping and to bring fairness, consistency, and predictability to high-stakes class action litigation.

SUMMARY OF THE ARGUMENT

There is no "class action" exception to the Due Process Clause. To the contrary, it is well settled that due process guarantees apply with full force to class action litigation, including class actions certified and tried in state courts. Accordingly, this Court has explained, the purely procedural class action device may not be employed in a manner that denies either plaintiffs or defendants their substantive constitutional rights. Class treatment must conform to due process, not vice versa.

A civil defendant's right to be heard and to present every available defense is among the Due Process Clause's essential guarantees. In this case, Louisiana's courts violated that guarantee when, in an effort to facilitate class treatment, they decreed an *ad hoc* exception to longstanding Louisiana fraud law. In particular, without any basis in existing precedent—and solely to impose class action procedures on the putative class members' inherently individualized claims—the courts below relieved the class plaintiffs of their burden to prove the "reliance" element of their fraud claims. As the trial court instructed the jury: "[P]laintiffs in this case do not have to establish individual reliance on specific concealments or misrepresentations made by these defendants." Pet. 7 (quoting 2003-07-24 Tr. 23506). By holding that the plaintiffs here—unlike other plaintiffs alleging fraud under Louisiana law—needn't demonstrate that any individual plaintiff actually relied on an alleged misrepresentation, the courts below impermissibly prevented the

defendants from contesting an essential element of the plaintiffs' claims and thereby deprived the defendants of due process.

This case provides the Court a unique and important opportunity to address the limits that the Due Process Clause places on state courts' use of the class action device. The Court should hold that state courts cannot facilitate class treatment by eliminating substantive protections that defendants would enjoy if class members' claims were tried individually.

The issue is of profound importance. Even after the enactment of the Class Action Fairness Act, which expands federal jurisdiction over class claims, many large class actions still must be litigated in state courts. Review of state class action procedures for constitutionality is notoriously difficult to obtain. The reason for the difficulty is clear. As a result of the coercive settlement pressures that class action defendants typically face—from potentially ruinous liability, runaway defense costs, poisonous publicity, etc.—the great majority of state class actions are resolved soon after certification, even those in which the plaintiffs' claims are weak. This case, one of the very few that has been litigated to judgment, thus presents this Court with a unique opportunity to address pressing (but review-evading) constitutional issues and provide state courts much-needed guidance.

The decision below, which approved a class action that relieved the plaintiffs of their burden to prove a necessary element of their claims, and thus eliminated an otherwise-available defense, threatens to increase exponentially the already-extortionate settlement pressures that class defendants confront. And perversely, that will

start the vicious cycle anew. As even fewer defendants are able to withstand the settlement pressure, and as more cases are resolved before trial, opportunities to scrutinize the very issues that give rise to the ratcheted-up pressure will further dwindle. This Court should seize the valuable opportunity that this case presents.

ARGUMENT

I. In An Effort To Make This Case "Work" As A Class Action, The Louisiana Courts Impermissibly Violated The Defendants' Due Process Right To Raise Every Available Defense.

This is a square-peg-round-hole case. In order to force some 500,000 plaintiffs' individual fraud claims into a class action posture, the Louisiana courts here effectively excused the plaintiffs' obligation to prove that they actually relied on defendants' supposed misrepresentations. In so doing, the courts—seemingly carving out a "class action" exception—ignored and distorted settled Louisiana fraud law. The question presented is whether, consistent with due process protections, a state court can cast aside otherwise applicable law in order to make a class action "work." The answer is no.

A. The Due Process Clause Guarantees Class Action Defendants The Right To Be Heard And To Present Every Available Defense.

The Due Process Clause indisputably constrains the conduct of litigation in state courts. *See, e.g.*, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative, branch of gov-

ernment."). It is likewise settled (and evidenced by the reference in the Clause to "property" alongside "life" and "liberty") that due process protections extend to the litigation of *civil lawsuits*. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) ("[T]here can be no doubt" that "due process of law," "when applied to judicial proceedings," "mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."). Finally, and most importantly here, it is settled that due process guarantees apply to state-court *class actions*. Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues," this Court has "long held ... that extreme applications" of such rules "may be inconsistent with ... federal right[s] that [are] fundamental in character." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). That commonsense principle—that state-court procedure must conform to constitutional command—has been repeatedly recognized and applied in the class action context. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847–48 & n.24 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985); *Hansberry v. Lee*, 311 U.S. 32, 42–43, 45 (1940).

This Court has already identified several specific "minimal procedural due process protection[s]" that apply in state court class actions, including notice, an opportunity to be heard, the right to opt out, and adequate representation. *Phillips Petroleum*, 472 U.S. at 811–812. *See also Hansberry*, 311 U.S. at 42–43, 45 (explaining representation requirement). Conversely, this Court has never suggested that a due process protection that applies in ordinary civil litigation can simply be jettisoned

in the class context. Class action defendants in state court, therefore, are entitled to the full panoply of fundamental due process guarantees. This much should be common ground.

"The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). More to the point for present purposes, this Court has long held that, as part and parcel of the right to be heard, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *accord Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934). It follows that a state-court class action may not be structured in such a way as to deny the defendant the opportunity to defend itself fully.

Not only is the defendant's due process right to present available defenses an indispensable element of the right to be heard, it is also the logical and necessary corollary to a plaintiff's due process right to present his or her claim on the merits. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."). If a plaintiff has the right to *assert* a claim, then surely the defendant must also have the right to *defend* by challenging the plaintiff's proof. *See, e.g.*, *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231–32 (2d Cir. 2008) (depriving defendants of the right to challenge plaintiffs' allegations in a class action results in a due process violation). The Due Process Clause, after all, does not play favorites. It

"protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan*, 455 U.S. at 429.

B. By Decreeing A *De Facto* Class Action Exception To Louisiana Fraud Law, The Louisiana Courts Deprived Defendants Of The Right To Raise Every Available Defense.

Federal rights may not be "nullified by the manipulation of state law." Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1052 (1977). Accordingly, a state court cannot defeat a defendant's rights, such as the right to present a complete defense, by resorting to semantics or selectively distorting governing law.

This Court has enforced that foundational principle—that States cannot define constitutional rights out of existence—in numerous contexts. For instance, although as a general matter the "property interests" protected by the Due Process and Takings Clauses are creatures of state law, *see Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court has clarified the commonsense point that a "State, by *ipse dixit*, may not transform private property into public property" and thereby circumvent constitutional guarantees. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). In *Webb's*, this Court held that the common-law "interest follows principal" rule reflects a core property right that warrants constitutional protection and rejected the notion that either "the Florida legislature by statute, [or] the Florida courts by judicial decree, may ... simply ...

recharacteriz[e] the principal as 'public money.'" *Id.* at 162, 164; *see also, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) ("[T]he government does not have unlimited power to redefine property rights."). Thus, when a State regulates or limits property rights, it must act in accordance with preexisting "background principles of ... property law." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031–32 (1992). *See also Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 (1994) (Scalia, J., joined by O'Connor, J., dissenting from the denial of certiorari) (observing that a State "cannot ... defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all") (quoting *Hughes v. State of Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring)).

In the same way, a state court cannot simply decree an unforeseeable exception to (or even a change in) otherwise applicable law in a way that deprives a litigant of liberty or property. The quintessential example is *Bouie v. City of Columbia*, 378 U.S. 347 (1964). There, two college students were convicted of misdemeanor trespass for remaining at a lunch counter after being told to leave. Although the statute of conviction forbade only "entry upon ... lands ... after notice ... prohibiting such entry," the state supreme court affirmed the convictions based on its *post hoc* construction of the statute to cover the act of refusing to leave. *Id.* at 348–50 & n.1. This Court reversed, holding that such "an unforeseeable and retroactive judicial expansion" of the statute violated the students' "right of fair warning" under the Due Process Clause. *Id.* at 352.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), is to the same effect. There, an automobile manufacturer was ordered to pay $2 million in punitive damages because it failed to disclose that a car had been repainted after it was damaged before delivery. *Id.* at 562–67. This Court held that the award violated due process, in part because potentially applicable civil fines of $10,000 or less failed to give the defendant "fair notice" that its conduct would "subject [it] to a multimillion dollar penalty." *Id.* at 584. As the Court explained, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574.[2]

This case raises the same basic problem. The Louisiana courts deprived defendants of their rights as civil litigants—and, in the end, their property—by judicial *ipse dixit* and without any warning whatsoever. In particular, the courts below, acting arbitrarily and without any warrant in existing precedent, created an *ad hoc* exception to longstanding state fraud law. Although the courts below expressly acknowledged that fraud in Louisiana requires proof of individualized reliance, they inexplicably excused the plaintiffs' responsibility to prove the reliance element. *See* Pet. App. 46a ("Proof of fraud re-

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[2] Other examples abound. *See, e.g.*, *Reich v. Collins*, 513 U.S. 106, 111–14 (1994) (holding that a State may not refuse to refund taxes it has unconstitutionally exacted by the expediency of eliminating a taxpayer's settled, preexisting right to seek a "postdeprivation" refund, and that while a State may validly limit taxpayers to "predeprivation" challenges, it "may *not* ... reconfigure its [remedial] scheme, unfairly, in *midcourse*"); *accord Newsweek, Inc. v. Florida Dep't of Rev.*, 522 U.S. 442, 444-45 (1998).

quires causation in the form of reliance.... However, individual reliance is not at issue in the instant case."). By doing so, the courts "eliminated any need for plaintiffs to prove, and denied any opportunity for [defendants] to contest," an indispensable prerequisite of the plaintiffs' causes of action. *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers).

In particular, the Louisiana courts held that the plaintiffs in this case could satisfy their burden of proof by showing reliance "common to the class a whole"—*i.e.*, without showing reliance by any particular individual—and could do so based on a newfangled and amorphous "public knowledge" concept. Pet. App. 46a–47a, 65a. So long as the defendants "intentionally engaged in actions designed to distort" this body of "public knowledge," the courts held that the plaintiffs did not need to prove that the defendants induced any actual reliance—liability to the class as a whole would follow. *Id.* at 46a–47a.

These "class as a whole" and "public knowledge" constructs were whole-cloth creations—without any foundation in Louisiana law and conceived solely as a means of obscuring plaintiff-to-plaintiff differences and thus making a class action feasible. The Due Process Clause simply does not countenance such a fast-and-loose approach to settled law. *Cf. Williams*, 549 U.S. at 353–54 (holding that due process prohibits the imposition of punitive damages "for injuring a nonparty" because the defendant "has no opportunity to defend against the charge, by showing, for example ..., that the [nonparty] was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary").

In sum, in an effort to pound the square peg of the plaintiffs' claims into the round hole of a class action lawsuit, the Louisiana courts distorted the applicable substantive law—and, in the process, defendants' substantive rights—beyond all recognition. That, a state court may not do.

II. This Case Provides An Ideal Vehicle To Resolve Issues Of Tremendous Legal And Practical Significance.

Even after the enactment of CAFA, federal jurisdiction over class action litigation is hardly universal. Many high-stakes class actions remain in state court, where "the constraints of the Due Process Clause will be the only federal protection." *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers). The problem is that despite the number of class actions in state court, review of state class action procedure is difficult to obtain. The reason is that the vast majority of state class actions settle, and for well-known reasons. Class defendants facing the risk of ruinous liability, soaring defense costs, negative publicity, and the business disruptions that can attend class litigation often have little choice but to capitulate. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims. ... In addition to skewing trial outcomes, class certification creates an insurmountable pressure on defendants to settle ....").

If the decision below is allowed to stand—simply sweeping aside weaknesses in and defenses to individual plaintiffs' claims on the ground that the case was brought on behalf of a purported "class as a whole"—the already-coercive settlement pressures threaten to in-

crease exponentially. Needless to say, that is an untenable position for American businesses and consumers alike.

This case is one of few class actions certified in state courts that did *not* settle. Indeed, defendants not only defended the case to verdict and judgment but also asserted their due process rights at every turn, ultimately resulting in three published appellate opinions directly or indirectly addressing the issues raised in the Petition. *See* Pet. App. 1a–30a, 31a–79a, 281a–303a. This case therefore presents the Court with a unique opportunity, in the context of a case tried to judgment, to address the due process limits on state class action procedure.

A. Even After CAFA, Many Large Class Actions Must Be Litigated In State Court.

As Congress recognized when it enacted CAFA, the class action device has been abused most often "in state courts, where the governing rules are applied inconsistently" and "frequently in a manner that contravenes basic fairness and due process considerations." S. Rep. 109-14, at 4 (2005); *see id.* at 21–23. Although CAFA addressed this problem in part by expanding federal-court jurisdiction over certain categories of class actions, many such actions continue to be filed in state court. And as this case demonstrates, removal is not always a ready solution; "major class action[s] ... will not be removable" under CAFA if they are "drawn to include only residents of" a single State. *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers).

Moreover, creative plaintiffs' attorneys continue to exploit loopholes in CAFA. For example, some attorneys now comb state-court records for small collections

actions in which to file "counterclaim class actions," thereby transforming small disputes over unpaid bills into sprawling, multimillion-dollar consumer class actions. At least according to some courts and commentators, such cases cannot be removed under CAFA regardless of the amount in controversy based on pre-CAFA case law interpreting the general removal statute, 28 U.S.C. § 1441, to prohibit removal by counterclaim defendants or additional counter-defendants. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 330-37 (4th Cir. 2008), *cert. denied sub nom. AT&T Mobility LLC v. Shorts*, 129 S. Ct. 2826 (2009); Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 196–97 (2007). *But see Palisades Collections*, 552 F.3d at 337–45 (Niemeyer, J., dissenting and dissenting from the denial of rehearing en banc).

Empirical evidence confirms that significant class action litigation continues to occur in the state courts. For example, despite CAFA's enactment in February 2005, more than 750 class actions were filed in 2005 in California alone, the vast majority of which were not removable.[3] Although this figure represented a predicta-

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[3] ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000-2006: FIRST INTERIM REPORT 3-4, 25 (Mar. 2009) [hereinafter "California Class Action Study"], *available at* http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf. CAFA took effect in February 2005. A sample of 177 of the 751 class actions filed in California in 2005 found that only 19.2% were permanently removed to federal court. *Id.* at 25. Federal Judicial Center researchers have relied on the California study in their analyses, noting that "reliable data on class action activity in most state court systems simply do not exist." Federal Judicial Center, *Progress Report to the Advisory Committee on Civil Rules on the Impact of*

ble decrease from the pre-CAFA high of 833 class actions filed in California in 2004, it significantly exceeded the number of class actions filed in the state in any of the four prior years. California Class Action Study, *supra* note 3, at 3–4. In other words, CAFA slowed, but for the most part did not defuse entirely, "the dramatic explosion of class actions in state courts." S. Rep. 109-14, at 14 (2005).

When a class defendant finds itself in state court—as often it will—its *only* federal protection is the Due Process Clause. It is therefore essential that this Court clarify the extent to which the Clause limits state courts' ability to distort otherwise applicable law as a means of making a class action work.

B. Most State Class Actions Settle Because Defendants Face Coercive Pressure To Capitulate Rather Than Litigate.

It is common knowledge that "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291–92 (2002) ("[E]mpirical studies ... confirm what most class action lawyers know to be true."); *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R.

CAFA on the Federal Courts, at 4 (Nov. 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CAFA ProgressReport-Final.pdf.

Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 647 (2006) ("[A]lmost all certified class actions settle.").

The reasons that so many class actions settle before trial are well-documented. Chief among them, of course, is that "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) (quoting FED. R. CIV. P. 23, advisory committee's note); *accord, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *Castano*, 84 F.3d at 746. When a class is certified, the aggregation of claims in a single action creates an "enhanced risk of costly error." *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010) (Posner, J.). If, for example, "a company is sued a number of times for selling a defective product," and "[i]t wins some of the cases and loses others," then "the aggregate outcome reflects more or less accurately the expected litigation value of the plaintiffs' claims." *Id.* "But when the central issue in a case is given class treatment" to be resolved "once-and-for-all" by a single trier of fact, "trial becomes a roll of the dice"; "a single throw may determine the outcome of an immense number of separate claims" and potentially impose staggering liability. *Id.* Because, to "put[] it mildly," a defendant "may not wish to roll these dice," there "will be ... intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.). Class certification threatens this ruinous liability, and thus creates coercive settlement pressure, even when the defendant is given

an opportunity in later proceedings to present individualized defenses. *Id.* When, as in this case, the defendant is *denied* that right, the risk –and the pressure—increases exponentially.

Liability risk forms only a part of the settlement pressure that class defendants face. In addition, "[c]lass actions are expensive to defend." *Cowen v. Bank United*, 70 F.3d 937, 941 (7th Cir. 1995) (Posner, C.J.); *see also Coopers & Lybrand*, 437 U.S. at 476 (noting that the threat of increased "litigation costs" may cause a defendant to "settle and ... abandon a meritorious defense" in the face of a certified class); FED. R. CIV. P. 23, advisory committee's note (same). In particular, "[o]ne purpose of discovery—improper and rarely acknowledged but pervasive—is: it makes one's opponent spend money." *Thorogood*, 624 F.3d at 849 (quotation marks omitted). "In most class action suits ... there is far more evidence that plaintiffs may be able to discover in defendants' records (including emails, the vast and ever-expanding volume of which has made the cost of discovery soar) than vice versa." *Id.* at 849–50; *see also* Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. MEM. L. REV. 53, 66 (2004) ("Corporate defendants' almost universally-voluminous files ... allow plaintiffs to impose, at the very outset of the litigation, huge document production costs...."). Accordingly, a defendant in a large class action may find it necessary to "settle a claim that appears to be without merit" simply to avoid the "burdensome" "cost of pre-trial discovery." Hensler, *supra*, at 65–66; *cf. also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

Compounding the liability and defense-cost problems, the threat of poisonous publicity can also induce defendants to settle even weak class claims. Reports of wrongdoing by big companies "make good 'copy'—even if the allegations are seemingly spurious, commonplace or unproven." Steven B. Hantler, Victor E. Schwartz, Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 COMMLAW CONSPECTUS 7, 10 (2004). Such reports typically lead with sensational accounts of the plaintiffs' unproven charges and alleged injuries and include the defendant's answer only secondarily, if at all. Moreover, while the plaintiffs' filing of a class action complaint is often a headline-grabbing event, the defendant's eventual refutation of the allegations typically receives little, if any, attention. *Id.* at 11 & n.15. It is therefore unsurprising that plaintiffs' lawyers in high-profile litigation often seek to "use the media as a vehicle" to coerce settlement by "driving down stock prices" and "vilifying the [defendant] among consumers." *Id.* at 8; *see also id.* at 31-32 (describing plaintiffs' lawyers use of this tactic in class actions against HMOs). It is equally predictable that "many ... defendants settle [such] cases under the theory that a bad settlement is better than a good lawsuit." *Id.* at 8 (quotation marks omitted).

Defendants may also choose to settle weak class claims to avoid the substantial business disruptions that class actions inevitably entail. From a business standpoint, the most significant cost is not the out-of-pocket liability or legal fees but the diversion of resources from productive activity. As this Court has noted, "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unre-

lated to the lawsuit." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Time that employees spend reviewing documents, meeting with attorneys, and preparing for or attending depositions is time spent away from the company's core business. Thus, "a plaintiff with a largely groundless claim [may] simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence." *Id.* at 741. Such disruption "is a social cost rather than a benefit." *Id.*

Finally, class actions can also impose crippling opportunity and investment costs. "A $50 million lawsuit against a company can easily prevent that company from raising $250 million or even $500 million in debt or equity to finance new, productive business activities." Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 374 (2009). "At the very least, the uncertainty surrounding a significant potential liability may increase a company's cost of capital by depressing its stock price or increasing the interest rate it must pay on its debt." *Id.*; *see also* Hantler et al., *supra*, at 31-32 (describing how Aetna's stock dropped 30% following plaintiffs' lawyers meetings with Wall Street analysts regarding HMO class actions). In some cases, such opportunity or investment costs "dwarf the primary costs" of the class action itself. Molot, *supra*, at 374–75.

In sum, a certified class action can create a perfect coercive storm. The risk, however remote, of ruinous liability combines with high defense costs, negative publicity, and the drag on business operations to produce an environment in which settlement often becomes the only

option. It is therefore hardly surprising that class certification—particularly in state court, where federal protection resides solely in the Due Process Clause—precipitates prompt settlement in the vast majority of cases.

C. The Rulings Below Will Exacerbate The "Blackmail Settlement" Problem.

Subjecting class defendants to coercive settlement pressures "even when the probability of an adverse judgment is low" has "been referred to as judicial blackmail." *Castano*, 84 F.3d at 746. Courts, of course, are "legitimate[ly]" "concern[ed] about" such "'blackmail settlements.'" *Rhone-Poulenc*, 51 F.3d at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

The risk of blackmail settlements demands careful attention to and rigorous application of the requirements for certifying class actions in the first instance, both under the Federal Rules of Civil Procedure and under the Due Process Clause. *See Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008) ("In the class-action context," due process protections "are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."); *see also Wal-Mart Stores, Inc. v. Dukes*, __ S. Ct. ___, 2010 WL 3358931 (Dec. 6, 2010) (No. 10-277). Beyond that, and particularly relevant here, the blackmail risk also demands close scrutiny of the procedures applied at trial in order to ensure that courts are not distorting governing legal principles or denying due process protections in the name of expediency. *See supra* pages 4–11; Pet. 14–28.

To be clear, the fact that most certified class actions settle before trial does not render "unimportant" the

need to police state courts' procedures in the class actions that do go to trial. *See* Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295, 295 (1989). In fact, just the opposite is true. Litigants "bargain with the knowledge that if they cannot strike a deal, a court ultimately may impose a resolution." *Id.* "[T]he rules and procedures used inside of court" thus "substantially affect[] the bargains reached outside of court." *Id.*

Accordingly, if—as here—the effect of a ruling certifying a class is to preclude examination of evident weaknesses in the plaintiffs' claims, or to preclude the defendant from presenting available defenses, then the case's blackmail value will skyrocket. As already noted, even in the best of circumstances, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476. If class certification effectively deprives the defendant of the right to present meritorious defenses—or relieves plaintiffs of the burden of proving necessary elements of their claims—then the defendant's bargaining position will evaporate entirely and the settlement pressure will, in almost all cases, become overwhelming. *Cf.* Nagareda, *supra*, at 103 ("If a cohesive class can be created through ... savvy crafting of the evidence," then "[t]he law [will] run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply upon the say-so of one side."). And to make matters worse, if class certification comes to be viewed as a means of avoiding strong defenses to weak claims, class litigation will mushroom as "the attraction of such lawsuits [will]

become[] apparent to an ever-increasing number of plaintiff lawyers." *Cf.* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary*, at 10 (Rand Inst. for Civ. Justice 1999), *available at* http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR969.1.pdf.

D. This Case Provides An Ideal Vehicle For Resolving Recurring Constitutional Issues Of Nationwide Importance.

As already explained, although class action treatment can frequently result in a denial of a defendant's constitutional rights, the class-certification pressure-cooker often precludes trial on the merits. Without a trial—and the appellate review that eventually ensues—constitutional wrongs simply go unaddressed.

This case, which resulted in a trial, verdict, judgment, and three reported appellate decisions, is a unique exception to the general rule.[4] The complete record of the trial and its subsequent review by the Louisiana courts provides the Court an ideal vehicle to address the question whether and to what extent the Due Process Clause limits state courts' ability to force class treatment by distorting the governing law and eliminating defendants' right to present available defenses. The record below amply demonstrates the fundamental unfairness

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[4] Indeed, in the California courts' study of class action litigation discussed above, out of 289 certified class actions, only *two* were tried to verdict. ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION tbl.D.1 (Feb. 2010), *available at* http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf.

of such distortions and denials. And, as the protracted proceedings and nine-figure judgment indicate, few defendants will have the wherewithal to risk a massive judgment in order to press these important issues. Rather, as a result of the coercive pressure to settle even weak cases, these issues will rarely see the light of trial, let alone make their way to this Court. The Court should take this opportunity to provide guidance on such important constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the

Supreme Court of the United States

PHILIP MORRIS USA, INC., *et al.*,

Petitioners,

v.

DEANIA M. JACKSON, on behalf of herself and all other persons similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause prevents state courts from employing the class action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims.

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INTEREST OF AMICUS CURIAE

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project is concerned with class action abuse and its adverse impact on the free market and entrepreneurial activities of America's job-creators and employers. To that end, PLF has participated as amicus curiae in many important cases involving misuse of class certification, including *Dukes v. Wal-Mart*, United States Supreme Court, docket no. 10-277 (pending); *Garcia v. Medved Chevrolet, et al.*, Colorado Supreme Court, docket no. 09SC1080 (pending); *Barber v. American Airlines*, Illinois Supreme Court, docket no. 110092 (pending); and *Grayson v. AT&T*, D.C. Ct. App., docket no. 07-CV-1264 (pending).[1]

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

States traditionally have considerable leeway in the rules they apply to class actions in their own state courts, but sometimes these procedures cross the line to violate the United States Constitution's due process guarantee. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (Class actions may "achieve economies of time, effort, and expense," but only when those goals can be achieved "without sacrificing procedural fairness or bringing about other undesirable results."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (The "Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members." (emphasis added)); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.").

This is such a case, and the issues presented are not an aberration. Plaintiffs in many jurisdictions are asking courts to strip defendants of the right to defend themselves, by simply "presuming" the existence of crucial elements of the plaintiffs' claims. Some seek an extension of the fraud-on-the-market doctrine announced in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Others simply appeal to a court's interest in efficient allocation of judicial resources. Most courts have thus far resisted, leaving the decision below an outlier in conflict with many circuit courts and state courts of last resort. If the decision below is permitted to stand, however, it could portend a barrage of new, lightly tethered class actions held together only on the

basis of presumptions. Class actions were intended to allow aggregation of substantially similar claims, not to allow deeply flawed claims to hide their individual deficiencies by mass presentation.

"The benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). For these reasons, the Petition should be granted.

ARGUMENT

I

THE DUE PROCESS REQUIREMENTS OF CLASS CERTIFICATION PRESENT A SIGNIFICANT NATIONWIDE ISSUE THAT CAN BE RESOLVED ONLY BY THIS COURT

Clearly class action litigation creates certain efficiencies; these efficiencies, however, cannot be employed at the cost of denying individual litigants justice in the courts. *Stone v. White*, 301 U.S. 532, 535 (1937) (where a plaintiff has a right to make an equitable claim, the defendant has an equal right to present a case to defeat that claim); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc) ("[C]onsiderations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice."), *cert. denied*, 464 U.S. 1040 (1984); *see also* James A. Henderson, Jr., *Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the

underlying claims remain individual in nature.").[2] Aggregating claims in a class action should not dramatically alter the substantive law underlying the lawsuit. *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978) ("Just as the meaning of liability does not vary because a trial is bifurcated, the requisite proof also in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23. . . . Consequently, this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs."); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) ("Generalized or class-wide proof of damages in a private anti-trust action would, in addition, contravene the mandate of the Rules Enabling Act that the Rules of Civil Procedure 'shall not abridge, enlarge or modify any substantive right.'") (footnote omitted).

Allowing plaintiffs to presume an essential element in their claim creates a procedure unfairly benefitting plaintiffs at the expense of defendants. *See, e.g., In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (plaintiffs' proposal to prove causation through individual affidavits submitted to special

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[2] Procedural fairness is required for individual justice for two reasons. First, fair process is often celebrated as an end in itself. *See, e.g.*, Judith Resnik, *et al.*, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 306 (1996). Underlying this view is the notion that every American has a right to his "own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4449 (1981)). Second, procedural fairness also implicates the results of litigation; in other words, the fairness of process can depend on the fairness of the outcomes it produces. *See, e.g.*, Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 201-02 (1992).

master rejected as "one-sided procedure [which] would amount to an end-run around defendant's right to cross-examine individual plaintiffs"). Even when there is a common question as to the wrongfulness of the defendant's conduct, "this is only half the question"; courts may not combine claims in a class action where there are individualized facts as to whether each class member suffered actual damages. *Yeger v. E*Trade Sec. LLC*, 65 A.D.3d 410, 884 N.Y.S.2d 21, 24 (N.Y. App. Div. 2009) (footnote omitted). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.").

The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. at 66. By removing individual considerations from the adversarial process, the judicial system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990, 1010-11 (1995); Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 Cornell L. Rev.

1022, 1023-24 (1995) (both observing that mass tort cases have a tendency to attract many unmeritorious claims). "If claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 438 (Tex. 2000).

One of the reasons for the individualized showings of causation, reliance, and injury is that class actions tend to attract substantial numbers of "parasitic" plaintiffs whose claims would be worthless were it not for the existence of the class. *See Thorogood v. Sears Roebuck & Co.*, 2010 U.S. App. LEXIS 24641, *13-*17 (7th Cir. Dec. 2, 2010) (on denial of rehearing en banc, citing considerable literature detailing the potential and actual abuses of the class action procedure); Rhetoric of Crisis, *supra*, at 994. Class treatment can hide the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

To guard against these potential problems, commonality in class action litigation must be genuine and not superficial. General allegations do not satisfy the commonality requirements when the actual facts of the case reflect that legal and evidentiary issues are not constant, but vary among class members. *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996) (evidence that putative class members would have acted in a particular manner is a "highly individualized" issue that defeats commonality). John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987) (commonality among

plaintiff class members is important because class members with stronger than average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole). Common questions such as, "Did the defendant defraud each member of the class?" can be manufactured in almost any case and are of little analytical value. Markham R. Leventhal, *Class Actions: Fundamentals of Certification Analysis*, 72 Fla. B.J. 10, 12 (1998).

Thus, most courts require a showing of individual reliance in consumer class actions. *See, e.g., Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 234-36 (Md. 2000) (reasoning that because class members with claims under state's consumer protection act would have to individually prove reliance on defendant's alleged misrepresentations and material omissions, class certification was inappropriate); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002) (refusing to adopt class-wide presumption of reliance on misrepresentations made by defendant where it found "no evidence that purchasers actually did rely on [defendant's] statements so uniformly that common issues of reliance predominate over individual issues"); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 975 (5th Cir. 2000) (As a general rule, "[c]ertification is improper if the merits of the claim [depend] on the defendant's individual dealings with each plaintiff."); *Hammett v. Am. Bankers Ins. Co. of Florida*, 203 F.R.D. 690, 699 (S.D. Fla. 2001) (whether the defendants delayed or improperly paid each class members' claims could not be determined only by considering the legality of the defendants' actions, but required consideration of each class member's cardholder agreement and claims history, because "these and other variables will affect

whether a class member has a cognizable injury"); *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1138 (Fla. Ct. App. 2008), *rev. denied*, 999 So. 2d 644 (Fla. 2008) ("[T]o proceed at the level of abstraction urged by [plaintiff] would raise due process concerns."). The public does not benefit from having individual consumer protection or tort claims weakened through improper class certification decisions.

II

COURTS NATIONWIDE ARE BEING ASKED TO "PRESUME" RELIANCE, INJURY, AND DAMAGE TO ALLOW CERTIFICATION THAT OTHERWISE WOULD BE DENIED FOR LACK OF PREDOMINANT COMMON ISSUES

In contrast with the decision below, most courts are properly disinclined to allow the class action procedure to override the need for individualized showings of reliance and injury,[3] placing the decision

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[3] *See, e.g., Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1092 (1993) (presumption of reliance cannot be applied to common law deceit and negligent misrepresentation claims in a securities class action); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474-75 (Del. 1992) (refusing to apply fraud-on-the-market presumption theory to state law class action fraud claims); *White v. BDO Seidman, LLP*, 249 Ga. Ct. App. 668, 671-72 (2001) (presumption of reliance inapplicable to negligent misrepresentation class action claim); *Kaufman v. i-Stat Corp.*, 165 N.J. 94, 109, 111 (2000) (no presumption of reliance to negligent misrepresentation class action claim); *Securities Investor Prot. Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000) (holding fraud-on-the-market, "[t]o the extent that the federal courts have adopted this concept . . . has applied only in the context of the federal securities law"(citing *Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 695 (9th Cir. 1977)); *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1337 (S.D. Fla. 2007); *Heindel v. Pfizer, Inc.*, 381 F.

(continued...)

below in conflict with the many cases identified in the Petition. The ripple effects of this case, therefore, will be strong and immediately felt if this Court does not review the decision below, particularly in light of the opinion accompanying the stay of proceedings, which would be perceived as being rejected. Creative class action counsel are continually looking for ways to "presume" elements of the plaintiffs' claims, so as to win the crucial first battle of certification.

For example, the Colorado Supreme Court currently is considering the case of *Garcia v. Medved Chevrolet* (docket no. 09SC1080), in which Trina Garcia, purporting to represent thousands of automobile purchasers, seeks to employ the fraud-on-the-market doctrine in the consumer protection context, so as to avoid having to prove any reliance on the alleged misrepresentations or any injury resulting from that reliance. Specifically, she alleges that the defendant automobile dealerships' addition of aftermarket products (such as pinstripes) to new vehicles violates the Colorado Consumer Protection Act when the documentation accompanying the sale does not break out the cost of those extra aftermarket products. Garcia purports to represent a class of all purchasers between 2003 through 2009, based on a presumption that each class member was injured by alleged misrepresentations in the common paperwork that accompanied each sale. *Garcia v. Medved Chevrolet, Inc.*, No. 09CA1465, 2009 Colo. App. LEXIS 1882, at *20 (Colo. Ct. App. Nov. 12, 2009).

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[3] (...continued)
Supp. 2d 364, 380 (D.N.J. 2004); *Mishkin v. Peat, Marwick, Mitchell & Co.*, 658 F. Supp. 271, 274-75 (S.D.N.Y. 1987).

The trial court certified two classes: purchasers who were charged for products that were never installed, and purchasers for whom products were installed but allegedly not adequately disclosed. The court of appeals, rejecting the fraud-on-the-market theory for consumer protection claims, reversed, holding that Garcia did not have a method to prove that each supposed member of the class was caused actual injury. *Id.* at *27-*28. The Colorado Supreme Court granted review of the case, specifically to decide whether "consumers in Colorado [can] pursue class actions under the Colorado Consumer Protection Act ("CCPA"), or do potential differences in each individual sale on the issue of ***reliance*** prevent class certification for lack of predominant issues of law or fact?" *Garcia v. Medved Chevrolet, Inc.*, Petition for Writ of Certiorari at 1 (filed Dec. 28, 2009).

Meanwhile, in New York, consumer-plaintiffs complained that they had overpaid for allegedly deceptively labeled "All Natural" Snapple containing the much maligned high fructose corn syrup, and sought class certification based on a presumption that the purported class members had relied on the label and been injured. *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742, 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. Aug. 3, 2010). The district court denied the motion to certify the class on the grounds that common issues did not predominate. *Id.* at *16-*17. The court held that the plaintiffs had no ability to prove at trial, through common evidence, that each of the putative class members paid a premium for Snapple beverages as a result of the "All Natural" labeling. *Id.* This proof was made especially difficult because, as is the case in the challenged car sales in *Garcia*, there was no "uniform price for Snapple beverages during the class

period" such that putative class members paid varying prices for the products. *Id.* at *23. The court emphasized that the issue of damages was bound up with the issue of injury and that therefore the plaintiffs failed to show how damages could be proven class wide. *Id.* at *18-*19. The court further rejected class certification on the plaintiffs' unjust enrichment claim, holding that it would require individual inquiries as to whether each class member was fully informed about the inclusion of high fructose corn syrup, whether they understood the syrup to be "natural," and whether they continued to buy Snapple despite their knowledge of the syrup. *Id.* at *35.[4]

The Eighth Circuit was entreated with plaintiffs' request for class certification in *In re St. Jude Medical Inc., Silzone Heart Valve Prods. Liability Litig.*, 522 F.3d 836 (8th Cir. 2008). The plaintiffs in that case had been implanted with heart valves that the manufacturer had recalled due to reports of leakage. The court found that individualized questions as to whether the patients or their doctors had ever been exposed to misrepresentations about the faulty medical device would overwhelm any common issues. *Id.* at 838-39. Even if Minnesota's consumer fraud statute did not require the plaintiffs to present direct evidence of reliance upon misleading statements, the court held that it could not

> prohibit St. Jude from presenting direct evidence that an individual plaintiff (or his or

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[4] *See also Pelman v. McDonald's Corp.*, 2010 U.S. Dist. LEXIS 114247, *30-*31, *38 (S.D.N.Y. Oct. 27, 2010) (decertifying, after eight years of litigation, the class of consumers claiming that McDonald's allegedly misleading advertising caused a laundry list of health problems).

> her physician) did not rely on representations from St. Jude. When such evidence is available, then it is highly relevant and probative on the question whether there is a causal nexus between alleged misrepresentations and any injury.

Id. at 840. The court bolstered its conclusion by noting that the defendants had discovered evidence that many of the named class representatives and their doctors had never been exposed to any misrepresentations about the device. *Id.* at 839. *See also Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-66 (9th Cir. 2004) (rejecting the plaintiffs' argument that evidence that video poker and electronic slot machines were deceptively advertised as games of chance sufficed as class-wide proof of individual reliance, on the basis that gamblers use such machines for a variety of individualized reasons); *In re TJX Cos. Retail Security Breach Litig.*, 246 F.R.D. 389, 395 (D. Mass. 2008) (where reliance is an element of a claim, a presumption of reliance is never appropriate because "[p]roving the element of reliance will necessarily involve individual questions of fact."); *In re Grand Theft Auto Video Game Consumer Litig. (No. II)*, 251 F.R.D. 139, 155-57 (S.D.N.Y. 2008) (rejecting plaintiffs' argument that evidence of single misrepresentation to entire class in form of video game rating was sufficient to establish that class members relied on rating's representation of game's content in making purchase); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 874 (Fla. Ct. App. 2006) (holding that allowing plaintiff class of 65,000 purchasers of termite control to prove their allegations of deficient performance through "collective proof" would, "[b]y any standard . . . amount to a violation of substantive due process of law").

CONCLUSION

"[T]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (extolling the virtues of the Due Process Clause) (footnote omitted). The defendant manufacturers in this case were deprived of their opportunity to defend themselves, while the plaintiffs were permitted to presume essential elements of their claims. This case raises significant due process questions of national importance.

The Petition for Writ of Certiorari should be granted.

DATED: December, 2010.

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JAN 3 - 2011

No. 10-735

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., *et al.*,

Petitioners,

v.

DEANIA M. JACKSON, On Behalf of Herself and All Other Persons Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims.

Amicus curiae focuses on one aspect of that question:

Whether the Due Process Clause prevents state courts from employing the class-action device in the manner described above, where the interests of the class representatives are not aligned with the interests of the absent class members.

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Miscellaneous:

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*,
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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, *cert. granted*, 2010 U.S. LEXIS 9588 (U.S., Dec. 8, 2010); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied,* 552 U.S. 941 (2007); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); and *Conn. Retirement Plans and Trust Funds v. Amgen, Inc.*, No. 09-56965 (9th Cir., dec. pending).

WLF is particularly concerned by the willingness of the Louisiana courts to permit the two named plaintiffs in this case to serve as representatives of a huge class of current and former smokers, despite uncontested evidence that their interests and alleged injuries diverged substantially from those of many class members. Given those divergent interests, absent class

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

members almost surely cannot be bound – consistently with due process – by judgments entered in these proceedings. Yet, the decision below requires Petitioners to pay hundreds of millions of dollars for the benefit of absent class members. WLF believes that Louisiana's heads-I-win-tails-you-lose approach to class-based litigation is patently unfair to defendants and is inconsistent with traditional notions of due process of law.

STATEMENT OF THE CASE

In 1996, Gloria Scott (now deceased) and Respondent Deania Jackson filed this tort action in the Civil District Court for the Parish of Orleans against Petitioners. They purported to represent a class of all current or former Louisiana smokers. They advanced three legal claims – product defect, fraud, and breach of an assumed duty; they sought recovery of monetary damages as well as an order requiring Petitioners to pay the costs of establishing a medical monitoring program and smoking cessation services for all class members.

In April 1997, the court certified a class of all Louisiana residents who, on or before May 24, 1996, were smokers of cigarettes manufactured by Petitioners and who desired to participate in a medical monitoring program (to ascertain whether they were suffering from any smoking-related diseases) or in a program designed to assist them to quit smoking. Petitioners appealed from the class certification order. In November 1998, the Louisiana Court of Appeal affirmed. Pet. App. 281a-303a. It stated that the case raised one fundamental question: "Is a cigarette that contains nicotine a defective product?" *Id.* at 286a. The court determined

that certification of a state-wide class was "proper" because, "There should be one answer to this question, and the only practical vehicle that can effectively arrive at one consistent answer is the class action procedure." *Id.*[2] The appeals court also stated, without further elaboration, that "the claims of the persons specified as class representatives [*i.e.*, Scott and Jackson] adequately represent a cross-section of the claims made." *Id.* at 302a.

On remand, the trial court determined that it would conduct the trial in two phases, with Phase I devoted largely to issues of fault and causation. The Phase I jury ruled in the plaintiffs' favor on some issues. However, it rejected the plaintiffs' claim that cigarettes manufactured by Petitioners were defective. *Id.* at 249a-252a.[3] Nonetheless, even though the "defective product" question had been the sole issue cited by the appeals court as a justification for trying the case on a class basis, the trial court did not decertify the class. Instead, the case continued through a Phase II trial on the scope and cost of a class-wide smoking cessation remedy. The jury determined that a 10-year smoking cessation program should be established (the plaintiffs had requested a 25-year program), and the trial judge issued a judgment ordering Petitioners to pay nearly $600 million into the court registry to fund the program.

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[2] In summarizing its holding, the appeals court added, "Plaintiffs assert that the defendants' liability is caused by the singular act of the tobacco industry in selling a defective product after concealing the addictive nature of nicotine." *Id.* at 302a.

[3] The jury also rejected the plaintiffs' claim that a medical monitoring program was warranted. *Id.* at 255a-257a.

The case continued as a class action despite the frank admissions of Scott and Jackson that they had quit smoking well in advance of trial. (Scott quit smoking in 2000, Jackson in 2001.) Thus, Scott and Jackson were purporting to represent the interests of 500,000 Louisiana smokers at trials that were designed to determine whether and to what extent Petitioners would be required to fund smoking cessation programs for those smokers, even though Scott and Jackson were not themselves smokers at the time of trial. The trial court saw no problem with such representation, even though Scott and Jackson's need for smoking cessation programs was highly dubious and was unquestionably different in kind from the needs of Louisiana residents who continued to smoke.[4]

On appeal, the court of appeals in 2007 affirmed the judgment in part. Pet. App. 31a-79a. In particular, it upheld the trial court's decision not to decertify the class. *Id.* at 62a-65a. The appeals court held that class treatment was appropriate because the case did not involve "distinct claims of individuals for individualized damage awards," but rather involved "a common unitary claim by a class as a whole for the establishment of a single unitary fund or program." *Id.* at 63a. The court did not address whether the interests of Scott and Jackson were sufficiently aligned with the interests of other class members to allow them to represent absent class members.

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[4] Of course, Scott and Jackson arguably shared with all former and current smokers a desire to establish a medical monitoring program designed to detect smoking-related diseases. But once the Phase I jury rejected a medical monitoring program, that common bond among class members evaporated.

The appeals court rejected the claims of a significant number of class members, however. It stated that the Louisiana Products Liability Act (LPLA), La.R.S. 9:2800.51 *et seq.*, provided the exclusive theory of liability to persons claiming a product defect after September 1, 1988, and that the Phase I jury's rejection of the plaintiffs' defective product claim precluded any liability under the LPLA. *Id.* at 39a. Accordingly, the appeals court ruled that the Phase I jury verdict precluded any recovery by class members who began smoking after September 1, 1988 (or who became addicted to cigarettes after that date). *Id.* at 38a-40a. The court remanded the case to the trial court "to reduce the amount of the damages to cover the Pre-1988 Smokers only" and to reduce the size of the smoking cessation program (by limiting the program to four of the 12 elements sought by the plaintiffs). *Id.* at 74a; *id.* at 78a (Cannizzaro, J., concurring).

Scott and Jackson were personally unaffected by the LPLA ruling because they both had begun smoking before 1988. But the result of the litigation they initiated was a Louisiana judgment that purported to preclude any product liability recovery against Petitioners by a sizeable number of Louisiana smokers who were not similarly situated to the two named plaintiffs.

On remand, the trial court declined to conduct further evidentiary proceedings or to reduce the judgment to reflect the exclusion of LPLA-barred smokers. Instead, it merely reduced the judgment to $264 million to reflect the mandated reduction (from 12 to four elements) in scope of the smoking cessation program.

On appeal, the court of appeals in 2010 amended the judgment in part and affirmed. Pet. App. 1a-30a. It reduced the judgment to $242 million based on its best estimate regarding the effect of eliminating LPLA-barred smokers from the smoking cessation program. *Id.* at 26a-28a. The court explicitly declined Petitioners' request that it reconsider the 2007 appeals court decision (which had rejected numerous due process challenges, including a challenge to class certification), ruling that reconsideration was barred by the law of the case doctrine. *Id.* at 9a.

The Louisiana Supreme Court denied Petitioners' request that it review the judgment. Pet. App. 80a-81. On September 24, 2010, Justice Scalia stayed execution of the judgment pending the Court's action on Petitioners' intended petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. The Court has stressed that "mandatory class actions aggregating damages claims implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he had not been made a party by service of process.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). While the Court has recognized an exception to that principle for "properly conducted class actions," it has stressed that an absent class member may not be bound by a class judgment unless he was "adequately represented by someone with the same interests who was a party to the suit." *Taylor*

v. Sturgell, 553 U.S. 880, 894 (2008).

In upholding the class-wide judgment in this case, the Louisiana courts have entirely jettisoned the "same interests" requirement. *Amicus* agrees with Petitioners that the Louisiana courts have adopted class action rules that violate a wide array of Petitioners' due process rights by eliminating numerous substantive and procedural protections that would otherwise have applied had the claims of class members been adjudicated on an individual basis. But of all those violations, *amicus* is most troubled by Louisiana's departure from the requirement that the interests of the class representatives must mirror those of the interests they purport to represent. In the absence of such a requirement, absent class members can legitimately complain that they have been denied their own day in court. Review is warranted to determine whether such a dramatic departure from historical class action practices comports with due process.

Some of the absent class members may be happy with the judgment entered by the Louisiana courts. Others – particularly those whose claims are barred because they started smoking after 1988 – are likely to be disappointed. If (as Petitioners contend) Scott and Jackson did not adequately represent absent class members, then those absent class will not be bound by the judgment below and will be free to challenge it collaterally. Such a result cannot possibly be deemed fair to Petitioners; they are being ordered to pay hundreds of millions of dollars for the benefit of absent class members whose claims were upheld by the Louisiana courts, yet they will have great difficulty defending the judgments entered in their favor against

thousands of other Louisiana smokers. Review is warranted to determine whether such a heads-I-win-tails-you-lose class action system comports with the Due Process Clause of the Fourteenth Amendment.

Review is also warranted because this case provides the Court with an unusual opportunity to give constitutional guidance to state courts regarding the use of class actions. When a plaintiff class is certified in a lawsuit, economic pressures generally compel the defendant to settle the case – regardless whether he judges the plaintiffs' claims have any merit. Even if a defendant wants to challenge class certification, in many States he is precluded from appealing until after the trial court enters a final judgment. Moreover, this Court lacks jurisdiction to exercise appellate review of a state court ruling unless the state court has entered a final judgment. The Petition presents the rare class action in which the defendant did not enter into a settlement following class certification but rather saw the case through to final judgment. Despite the increasing number of plaintiff classes being certified by state courts, the Court has not had an opportunity for several decades to provide guidance to state courts regarding due process limitations on class-wide adjudication. *Amicus* respectfully submits that the Court may not have another similar opportunity in the foreseeable future.

I. REVIEW IS WARRANTED BECAUSE LOUISIANA VIOLATES FUNDAMENTAL DUE PROCESS RIGHTS BY PERMITTING NAMED PLAINTIFFS TO REPRESENT THOSE WITH DISSIMILAR INTERESTS

The trial court certified a plaintiff class consisting of hundreds of thousands of Louisiana citizens with widely divergent interests. The certified class encompassed virtually all Louisiana citizens who had smoked Petitioners' cigarettes on or before May 24, 1996 and who desired to participate in either a medical monitoring program or a smoking cessation program. The plaintiffs contended (and the trial court so held) that Petitioners could be held liable under Louisiana tort law based on their alleged fraudulent marketing of cigarettes, without regard to whether individual class members actually relied on the fraudulent marketing. Pet. App. 45a-48a, 63a.

But the Louisiana courts nonetheless made clear that they ultimately were adjudicating the rights of individual citizens, rather than the right of a governmental body to seek sanctions against a corporation deemed to have harmed the general public. Based on the evidence presented by Scott and Jackson, the Phase I and Phase II juries provided individual class members some of the relief they requested and denied them other relief. Indeed, thousands of the absent class members were awarded no relief whatsoever. The Louisiana courts have adjudged that Petitioners must pay $242 million (plus interest) to the court registry to cover the costs of absent class members' smoking cessation programs, but that the absent class members are barred from seeking to recover the costs of medical

monitoring and that class members who started smoking after 1988 should receive nothing. Review is warranted to determine whether that judgment complies with the due process rights of either Petitioners or the absent class members, given the implausibility of any assertion that two individuals could adequately represent the divergent interests of hundreds of thousands of smokers.

Amici note initially that Petitioners have standing to raise claims based on the inadequacy of representation afforded to absent class members. It is well settled that a defendant in a class action has standing to complain that a court has inadequately protected the due process rights of absent parties. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court made clear that defendants suffer injury-in-fact sufficient for standing purposes if they must defend a suit in which absent class members (due to inattention to due process rights) can choose not to be bound by any judgment with which they are not satisfied. The Court explained:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

It is "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ortiz*, 527 U.S. at 846 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). "Although 'we have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' . . . the burden of justification rests on the exception." *Id.* (quoting *Martin*, 490 U.S. at 762 n.2). The Court held unequivocally in *Hansberry* that due process mandates that absent parties may not be bound by a judgment unless the procedures adopted by the court "fairly insures the protections of the interests of absent parties" as where their interests "are adequately represented by parties who are present." 311 U.S. at 42-43.[5] Reiterating that requirement in the context of a state-court class action seeking a money judgment, *Shutts* held that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45). *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 ((1997) (Fed.R.Civ.P. 23(a)(4) requires, before a class may be certified, that "a class representative must be part of the class and possess the same interest and suffer the same injury as class members," and that "the named plaintiff's claim

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[5] *Hansberry* held that property owners could not, consistently with due process, be bound by a judgment in prior litigation in which a similarly situated property owner had been deemed bound by a racially restrictive covenant contained in property deeds, because it was not clear that the interests of the prior defendant coincided with those of the *Hansberry* defendants. *Id.* at 44-45.

and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.").

At no point in these proceedings did Scott or Jackson demonstrate that their claims and the claims of absent class members were sufficiently interrelated that they would adequately protect the interests of absent class members. In particular, the interests of former smokers (such as Scott and Jackson) in the creation of smoking cessation programs are decidedly different than the interests of current smokers. First, it is highly dubious that former smokers have any need whatsoever for a smoking cessation program. That is particularly true of former smokers such as Scott and Jackson, who had not been smoking for a number of years by the time jury trials were conducted in this case. But even if former smokers have a bona fide interest in participating in smoking "cessation" programs, one can be reasonably certain that the interest would be directed toward a program tailored to the needs of former smokers who seek to ensure that they do not relapse. Current smokers, on the other hand, would seek programs specifically designed to assist those who are seeking to end an ongoing smoking habit. Moreover, former smokers such as Scott and Jackson would be far more likely than current smokers to emphasize other forms of relief (such as a medical monitoring program).

The record also indicates that the interests of Scott and Jackson (who began smoking before 1988) diverged dramatically from the interests of absent class members who began smoking (or first became addicted to cigarettes) after September 1, 1988. Class members in the latter category had to overcome limitations on

liability imposed by the Louisiana Products Liability Act, which provided the exclusive theory of liability to persons claiming a product defect after September 1, 1988.[6] Scott, Jackson, and their attorneys failed in their efforts to overcome those limitations on liability, and thus post-1988 smokers were denied all recovery in this case. Of course, Scott and Jackson were personally unaffected by that defeat. It is impossible to conclude that they adequately represented the interests of the plaintiff class when they had no personal stake in how the Louisiana courts resolved the LPLA issue.

Nor is the conclusion that Scott and Jackson inadequately represented the interests of absent class members affected by the fact that the courts ultimately established a smoking cessation program open to both current and former smokers. Fundamental fairness does not permit courts to await the results of litigation before deciding whether the named plaintiffs are adequate representatives of the class. Permitting such after-the-fact analysis would stack the deck against defendants. Absent class members would be able to sit back and reap the benefits of judgments entered in their favor while invoking due process concerns to bring collateral challenges to judgments decided against the plaintiff class (*e.g.*, the LPLA determination and the rejection of claims for a medical monitoring program).

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[6] The interests of Scott and Jackson also differed from those of many absent class members in that both Scott and Jackson began smoking for reasons unrelated to Petitioners' allegedly fraudulent claims regarding smoking and nicotine addiction. Scott and Jackson alleged that those statements were related only to their temporary inability to quit smoking, not to their decisions to start smoking.

As the Court made clear in *Shutts*, a class action defendant "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata" to the same extent that the class action defendant is bound. 472 U.S. at 805. Petitioners are entitled to have their claim – that the interests of current smokers were inadequacy represented – decided without regard to the merits-based judgment ultimately entered by the Louisiana courts. Review is warranted to determine whether the Due Process Clause permits state courts to certify a plaintiff class when, as here, the interests of the named plaintiffs diverged so dramatically from those of large segments of the plaintiff class.

The due process concerns in this case are heightened because the trial court (over Petitioners' objections) determined that Scott and Jackson would not be required to provide personal notice of the suit to absent class members. The appeals court upheld that determination, stating:

> Defendants also aver that individual notice to potential plaintiffs should have been issued, instead of publication notice only. . . . In light of the large number of potential plaintiffs, individual notice would be unduly burdensome. Publication notice is adequate and sufficient in this matter.

Pet. App. 64a-65a.

That failure to provide personal notice is "troubling" because "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and

can choose for himself whether to appear or default, acquiesce or contest.'" *Richards v. Jefferson County*, 517 U.S. 793, 799 ((1996) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The Due Process Clause prohibits a State from binding an absent class member to a court judgment unless he has received at least the level of notice required by *Mullane*, that is, the "best practical" notice that is "'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314). Because *Mullane* and later decisions of this Court made clear that notice as so defined meant, at a minimum, sending notice by mail to all interested parties whose names and addresses could reasonably be ascertained, the Louisiana court's resort to notice by publication is constitutionally problematic.[7] The inadequacy of notice provides an additional reason why due process review of Louisiana class action procedures

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[7] The appeals court apparently interpreted *Mullane*'s "reasonably calculated" language as a license for courts to engage in a cost-benefit analysis, and to reject notice by mail where its high costs outweigh the increased likelihood that class members will receive notice. *Mullane* did not sanction any such balancing process; rather, it required that notice be provided "in a manner reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315. As the Court later explained, *Mullane* "held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). *See also Amchem Products*, 521 U.S. at 617 (notice requirements "may not be relaxed based on high costs"). While obtaining the name and address of every smoker in Louisiana may not have been feasible, such difficulty does not excuse failure to provide notice to the many smokers whose identity could have been ascertained without great difficulty.

is warranted.

II. THIS CASE PROVIDES THE COURT WITH AN UNUSUAL OPPORTUNITY TO GIVE GUIDANCE TO STATE COURTS REGARDING THE USE OF CLASS ACTIONS

Review is also warranted because this case provides the Court with an unusual opportunity to give constitutional guidance to state courts regarding the use of class actions. Only rarely do litigants seek review in this court from state-court decisions addressing federal constitutional limits on use of class action devices. Rarer still are the instances where, as here, a litigant seeks review of a final judgment in a case in which the case was tried on a class-wide basis. But the paucity of such requests for review should not be taken as an indication that class certification disputes arise only infrequently in state courts. Rather, the infrequency of petitions seeking review of these issues is a function of the high likelihood of settlement once a plaintiff class is certified. Indeed, Congress has determined that procedural irregularities in state-court class actions is a serious problem; it adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, largely in response to concerns that the procedural rights of defendants were not being adequately protected in many state-court class actions. CAFA broadens the right of such defendants to remove their cases to federal court.

Not since *Shutts* was decided in 1985 has the Court directly addressed constitutional limitations on class action procedures adopted by state courts. *Amicus* respectfully submits that the Court should take

advantage of this unusual opportunity to provide guidance in an unsettled are of constitutional law by granting review in this case.[8]

The overwhelming tendency of class action defendants to settle once a plaintiff class is certified is well-documented. Defendants feel "intense pressure to settle" cases in which a large plaintiff class has been certified because large classes bring with them the potential for enormous monetary judgments. *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 1984 (1995). If not wanting to "roll the dice," they settle, often without regard to the merits of the plaintiffs' claims. *Id.* Such settlements can in many instances legitimately be deemed "blackmail settlements." H. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See also Castano v. American Tobacco Co.* 84 F.3d 734, 746 (5th Cir. 1996) (pressure emanating from certification of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"). Certification of a large plaintiff class often also

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[8] In 1996, the Court granted review in a case to consider the due process rights of absent class members to exclude themselves from the settlement of a state-court class action. However, the Court later dismissed the writ as improvidently granted because, it determined, the petitioner had failed to preserve his federal constitutional claim in the Alabama court proceedings. *Adams v. Robertson*, 520 U.S. 83 (1997) (*per curiam*). No similar procedural barriers exist in this case. Petitioners repeatedly argued in the Louisiana courts that the class action procedures adopted by the courts violated Petitioners' rights under the Due Process Clause.

exposes the defendant to enormous discovery costs, costs that are rarely, if ever, shared to an equal degree by the plaintiff class. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1299-1300 (2002).

Rule 23 of the Federal Rules of Civil Procedure was amended in 1998 to provide for interlocutory review (at the discretion of the federal appeals courts) of a district court order granting or denying class certification. Fed.R.Civ.P. 23(f). That amendment has to some extent lessened pressure on defendants to settle immediately following a district court order erroneously (in their view) granting class certification, and provides them with an avenue for correcting erroneous certifications. But defendants in state courts often are denied a similar option. Many state courts continue to prohibit interlocutory appeals from class certification orders. *See* Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 KAN. L. REV. 1027 (2010).

Moreover, even in those States (such as Louisiana) that permit interlocutory appeals from class certification orders, statutes governing this Court's jurisdiction virtually require defendants to endure a class-wide trial of all claims (a huge financial risk that most defendants cannot afford to undertake) before they can obtain federal court review of their federal constitutional claims. The relevant jurisdictional statute limits the Court's certiorari jurisdiction to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The Court lacks certiorari jurisdiction over state appellate decisions rejecting – on

interlocutory appeal – a due process challenge to a class certification order, because such decisions almost surely are not "final" judgments within the meaning of § 1257(a).

In sum, this case presents a particularly good vehicle for addressing the important issues of federal constitutional laws raised therein. Louisiana has adopted a novel interpretation of due process limitations on class action litigation. Petitioners raised its federal due process objections throughout the 14-year history of this class action litigation, and their claims have been squarely rejected by the Louisiana courts. The case has been fully tried, and a $242 million final judgment has been rendered. Accordingly, the Court will be able to consider the due process claims on the basis of a fully developed record. Moreover, because (for the reasons explained above) so few cases involving a certified plaintiff class actually reach the final judgment stage, this case offers a rare opportunity for review of the due process issues raised by the petition. In the absence of other cases in the judicial pipeline raising similar constitutional issues, *amicus* urges the Court not to pass on this opportunity.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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